

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel,

Appellant,

v.

The Public Utilities Commission of Ohio,

Appellee.

) Case No. 09-1547
)
)
)
) Appeal from the Public
) Utilities Commission of Ohio
) Case Nos. 07-1080-GA-AIR
) and 07-1081-GA-ALT
)
)
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FILED

OCT 08 2009

CLERK OF COURT
SUPREME COURT OF OHIO

**MOTION FOR A STAY OF EXECUTION
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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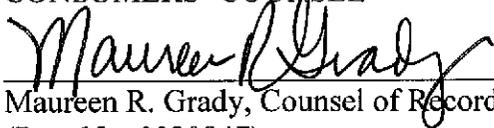
To serve the public interest and avoid irreparable harm to the customers of Vectren Energy Delivery of Ohio, Inc. ("Vectren" "VEDO" or "Company"), the Office of the Ohio Consumer's Counsel ("OCC" or "Appellant") respectfully moves this Court, pursuant to S.Ct. R. XIV, Section 4, to issue an order granting a Stay of Execution pertaining to the implementation of Stage 2 rates, initially approved in the Opinion and Order ("Order") and an Entry of the Public Utilities Commission of Ohio ("PUCO," "Commission" or "Appellee"). The Order and Entry were journalized on January 7, 2009 and February 4, 2009, respectively, and are attached hereto as Exhibit A and Exhibit B.

That Order only recently became a "final order" under R.C. 4903.13, when—nearly five months after OCC filed an Application for Rehearing—the Commission belated issued an Entry on Rehearing denying OCC's Application for Rehearing. Pursuantly to the stay provisions of R.C. 4903.16 (Appx. 000003), OCC seeks to stay the

effective date (February 22, 2010) of the next and final stage (Stage 2) of the objectionable Straight Fixed Variable rate design that the PUCO authorized Vectren to impose on residential consumers. For the reasons set forth in the following Memorandum in Support, the requested Stay of Execution should be granted.

Respectfully submitted,

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for Gas Services and Related Matters.*
PUCO Case No. 07-1080-GA-AIR et al.,
Opinion and Order (January 7, 2009)

Exhibit B *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc.,
for Authority to Amend its Filed Tariffs to Increase the Rates and Charges
for Gas Services and Related Matters.*
PUCO Case No. 07-1080-GA-AIR et al.,
Entry (February 4, 2009)

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

The Office of the Ohio Consumers' Counsel moves to stay the PUCO's Order and Entry that provide Vectren with an unlawful and unreasonable means to collect distribution rates from customers. The unlawful and unreasonable means is the rate design the PUCO ordered Vectren to implement for collecting revenues from its customers for distribution service. This rate design, known as Straight Fixed Variable ("SFV"), is the subject of the underlying appeal now before this Court¹ and is the subject of two separate appeals filed in 2008 and 2009 with the Court.² Those appeals were consolidated by the Court on September 2, 2009, and oral arguments on those appeals were recently heard on Sept. 16, 2009.

¹ The appeal also presents issues of inadequate notice under R.C. 4909.18 and 4909.19. (Appx. 000008 and 000010). OCC's notice of appeal was filed within three hours of the PUCO's denial of OCC's Entry on Rehearing.

² See *OCC v. Public Utilities Commission of Ohio*, Case Nos. 08-1837 and 09-0314.

The case underlying this appeal began on September 28, 2007, when Vectren filed a Pre-Filing Notice of its intent to increase distribution rates. Unlike DEO and Duke, the utilities in the consolidated appeals, Vectren *did* include a proposal for the SFV rate design in its application. Nonetheless, Vectren's Pre-Filing Notice did not propose to implement a *total* SFV rate design -- a fixed unavoidable customer charge with *no* volumetric rate. Rather Vectren proposed to implement SFV in stages over a period of two rate case cycles, which would have resulted in a total SFV rate design some time *after* the next rate case filing by Vectren, with complete SFV to be implemented 5-7 years from now.³

Both the Company and the PUCO claimed that one of the primary drivers of the SFV proposal was the fact that average use per customer was decreasing, thereby reducing overall sales for Vectren. With less gas sold, Vectren's ability to collect costs from customers through the volumes of gas sold was affected. Vectren witness Jerry Ulrey testified that one of the contributing factors to reduced usage was the high natural gas prices compared to prior years.⁴ Mr. Ulrey testified that as the price of gas goes up, it is expected that customers will "dial down" or use less gas.⁵ However, as recognized by members of this Court at the DEO/Duke oral argument, the price of natural gas has dropped dramatically and continues to be much lower than the historic levels of gas prices in effect when the rate cases were tried before the PUCO. Hence, one of the PUCO's primary reasons to move to a complete SFV rate design is no longer valid.

³ Company Ex. 9A at 4 (Ulrey Supplemental testimony) (R.67).

⁴ Tr. II at 59-60 (Appx. 000051).

⁵ Mr. Ulrey in his testimony relied upon AGA studies on price elasticity that conveyed that as the price of gas goes up, customers respond by using less gas. Tr. II at 59-60.

SFV is not the only issue being appealed here, though. Like the Duke and DEO appeals, the adequacy of the notice provided to customers is also an issue. Vectren only provided customers notice of the first stage of the SFV rate design, showing an increased customer charge of \$13.37 and a decreased volumetric rate of 0.07451 per Ccf. It did not provide customers with any notice of the second stage of the increase. Vectren also failed to define the “straight fixed variable rate design” it was proposing to move toward, as discussed *infra*.

Later and by virtue of the sea change proposal of the PUCO Staff, which Vectren embraced, the fixed monthly customer charge more than doubled from the pre-rate case level of \$7.00 to \$18.37 (Stage 2). Through its Order, the Commission implemented a *total SFV rate design, with a fixed unavoidable customer charge and no charge for gas used, beginning on February 22, 2010* -- the second year of new rates for Vectren. The Commission, thus, similar to its rulings in the consolidated appeals of the Duke and DEO case, gave the utility even more than it had asked for by imposing a total SFV rate design on customers in 2010—approximately six years earlier than proposed by Vectren.

OCC applied for Rehearing of that Order, and on March 4, 2009, the Commission granted, for purposes of further consideration, the OCC’s Application, stating that “[S]ufficient reason has been set forth by OCC to warrant further consideration of the matters specified in the applications for rehearing.”⁶ Notably, even though the Commission ostensibly was “further considering” OCC’s application requesting

⁶ *In the Matter of the Application of VEDO Energy Delivery of Ohio Inc. for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Services and Related Matters*, Case No. 07-1080-GA-AIR, Entry on Rehearing at par. 7 (March 4, 2009). Had the Commission issued its Entry on Rehearing in a timely fashion, OCC would have requested consolidation of its appeal here with the DEO and Duke appeals.

rehearing on SFV and notice in the Vectren case, two appeals on the very same issues were already filed and progressing at the Supreme Court. The SFV appeal of the PUCO's holding in Duke's rate case⁷ was filed on September 16, 2008 as S.Ct. Case No. 09-1837; the SFV appeal in DEO's rate case⁸ was filed on February 11, 2009 as S.Ct. Case No. 09-314.

Not surprisingly, in ruling on OCC's Application for Rehearing the PUCO left unaltered its Order implementing SFV, despite the fact that the Commission was "further considering" OCC's rehearing request for almost five months. An Entry on Rehearing was finally issued, affirming the January 7, 2009 Opinion and Order, on the eve of oral arguments in the consolidated DEO and Duke appeal.⁹ Moreover, in large respects, the Commission, in denying OCC's Application for Rehearing, merely reprised its earlier findings in the Duke and DEO rate cases.

Notwithstanding the Commission's findings to the contrary, the SFV will negatively impact low-use and low-income customers and will impede energy efficiency, violating R.C. 4905.70 (Appx. 000007) and R.C. 4929.02(A)(4) (Appx. 000015). Additionally, the Commission erred in implementing a drastic change to charging customers for gas distribution service without showing that the need to change is clear

⁷*In the Matter of the Application of Duke Energy Ohio, Inc., for approval of an Electric Security Plan*, PUCO Case No. 07-589-GA-AIR et al., Opinion and Order (May 28, 2008).

⁸*In the Matter of the Application of The East Ohio Gas Company d.b.a. Dominion East Ohio for Authority to Increase Rates for Its Gas Distribution Service*, PUCO Case No. 07-829-GA-AIR et al., Opinion and Order (October 15, 2008).

⁹*In the Matter of the Application of VEDO Energy Delivery of Ohio Inc. for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Gas Services and Related Matters*, Case No. 07-1080-GA-AIR, Entry on Rehearing (August 26, 2009). (R. 124).

and its prior decisions establishing rate design are in error.¹⁰ Moreover, the notice requirements of R.C. 4909.18 and 4909.19 were not fulfilled, depriving customers of the opportunity to be heard on the new structure of rates they would ultimately pay. All of these errors, similar to the errors pointed out in the DEO and Duke appeal, give reason to the Court to reverse the Commission and remand this underlying appeal back to the Commission, with instructions to cure the defects.

In the meantime, while this appeal and the Duke and DEO appeals are pending, rates are being collected from Vectren customers under the first stage of SFV. The second stage of the SFV is set to begin February 22, 2010, when the total SFV rate design will be imposed upon customers -- consisting of an unavoidable customer charge of \$18.37 and no charge for gas volumes used.

The Court now has an opportunity to stay this next and final stage of SFV and prevent further injury to VEDO's residential customers. Otherwise, the next stage -- a flash cut to a total SFV with an unavoidable \$18.37 customer charge and no volumetric charge -- will be forced on customers causing irreparable harm, as will be explained below. It is this irreparable harm that OCC asks the Court to halt. Because it is unlikely

¹⁰ *Office of Consumers' Counsel v. Pub. Util. Comm.* (1984), 10 Ohio St.3d 49, 50, 461 N.E.2d 303, quoting *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d. 431, 330 N.E.2d 1. See also *State, ex rel. Auto Machine Co. v. Brown* (1929), 121 Ohio St. 73, 166 N.E. 903. See also *Atchison v. Wichita Bd. of Trade*, 412 U.S. 800, 806, 93 S.Ct. 2367 (In 1973 the U.S. Supreme Court set a limit on the power of federal agencies to change prior established policies stating that, while an agency may flatly repudiate its norms, "whatever the ground for the departure [whether it is completely disregarding a policy or simply narrowing its applicability] * * * it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate."); *Williams Gas Processing v. FERC* (C.A.D.C. 2006), 475 F.3d 319, 326 (The Court further added that, although not bound by precedent, a demonstration of "reasoned decision-making necessarily requires consideration of relevant precedent.").

that this appeal will be resolved before the next and final stage of the SFV is implemented in February 2010, OCC requests a Stay of Execution to prevent *additional* irreparable harm to VEDO's residential customers in the meantime.

The Stage 2 rate design change is not a revenue increase for Vectren. It will not change the overall revenues that Vectren is authorized to collect. Therefore, a stay of the February 2010 (Stage 2) rate design will not impede Vectren's opportunity to implement and collect its approved revenues, because these revenues are already reflected in the Stage 1 rates and are currently being collected pursuant to those rates.

As will be explained fully in the OCC's Merit Brief, the PUCO approved a two-stage approach to Vectren's rate design, abandoning thirty years of precedent. Under the SFV approach ordered by the PUCO, customer charges increase dramatically, while volumetric rates cease to exist. The two stages of SFV for Vectren's residential customers are as follows:¹¹

	<u>Customer Charge</u>	<u>Volumetric Charge</u>
Rates Prior to Increase:	\$7.00	\$0.11986 first 50 Ccf \$0.10442 above 50 Ccf
Stage 1: (2/22/09)	\$13.37	\$0.07451 per all Ccf
Stage 2: (2/22/10)	\$18.37	\$0.000000

As illustrated, the fixed monthly customer charge rapidly increases, and there is no volumetric charge at the second stage. Under this approach, in 2010 VEDO has the opportunity to collect *all* of its distribution service revenues from the fixed customer

¹¹*In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc. for an Increase in Its Natural Gas Rates*, PUCO Case No. 07-1080-GA-AIR, et al., Rate 310, Residential Sales Service, Sheet No. 10 (Stage *1 & 2) (February 17, 2009). (R. 121).

charge that customers cannot avoid, and no revenues from the volumetric charges that customers historically could control by reducing their usage. Both stages of the rate design were proposed by Vectren and modified and approved by the PUCO, to provide Vectren with the opportunity to collect the revenues authorized by the PUCO in its Order. Thus, the Court can grant the stay to prevent Stage 2 rates from being charged to customers and Vectren will continue to have the opportunity to collect Stage 1 rates. As a result, no substantial harm will flow to the Company if this stay is granted.

II. STANDARD OF REVIEW

There is no controlling precedent in Ohio setting forth the conditions under which an order of the Commission shall be stayed.¹² However, the Commission has urged adoption of the four-part analysis suggested by Justice Douglas in his dissent in *MCI Telecommunications Corp. v. Pub. Util. Com.*¹³ There Justice Douglas presented four factors to consider when examining a request for a stay of a Commission order: (a) Whether there has been a strong showing that movant is likely to prevail on the merits; (b) Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay; (c) Whether the stay would cause substantial harm to other parties; and (d) Where lies the public interest.¹⁴ As illustrated below, this Court should stay the Commission's order because OCC can show a strong public interest in favor of the stay, a

¹² *In the Matter of the Commission's Investigation Into the Modification of Intrastate Access Charges* (Feb. 20, 2003), PUCO Case No. 00-127-TP-COI, unreported (citing *MCI Telecommunications Corp. v. Pub. Util. Com.* (1987), 31 Ohio St.3d 604, 606 (Douglas, J., dissenting)). (Appx. 000062-000072).

¹³ *MCI Telecommunications Corp. v. Pub. Util. Com.* (1987), 31 Ohio St.3d 604, 606 (Douglas, J., dissenting))

¹⁴ *Id.*

strong likelihood of prevailing on the merits, irreparable harm to consumers if the stay is not issued, and no substantial harm to Vectren if the stay is granted.

III. LAW AND ARGUMENT

A. **A Stay Of The Stage 2 SFV Rate Design Will Serve The Public Interest Because The Stay Will Ensure Compliance With The Public Policy Of R.C. 4929.02(A)(4) And With The Conservation Encouraged By R.C. 4905.70.**

Justice Douglas, in articulating a standard for stays, emphasized that the most important consideration is “above all * * *, where lies the interest of the public” and that “the public interest [] is the ultimate important consideration for this court in these types of cases.”¹⁵ Justice Douglas’ dissent in *MCI* emphasizes that Commission Orders “have effect on everyone in this state -- individuals, business and industry.”¹⁶ In these difficult economic times, that effect is most sharply felt by individual residential consumers who can ill afford increases in essential services, such as utilities in general, and the supply of natural gas fuel, in particular.

The public interest in this case is intertwined with the state policy of encouraging conservation and energy efficiency efforts in Ohio. R.C. 4929.02(A)(4) encourages “innovation and market access for cost-effective supply- and demand-side natural gas services and goods.”¹⁷ Moreover, R.C. 4905.70 requires the Commission to initiate programs that promote and encourage conservation and reduced consumption.

¹⁵ Id.

¹⁶ Id.

¹⁷ R.C. 4929.02(A)(4).

Yet, the SFV rate design contradicts and undermines this policy. Instead the price signal received by customers is that no matter how much they reduce consumption, their distribution bill will not be reduced. In other words, for distribution service rates, customers can use as much gas as they want, without having to pay any more than the flat unavoidable customer charge (in 2010). This rate design discourages customers from pursuing conservation efforts such as purchasing insulation and other conservation retrofits.

Recent developments in high-efficiency furnaces and set-back thermostats, which promote conservation and energy efficiency, gained “market access” because individual consumers were motivated to lower their utility bills by conserving fuel and using it more efficiently. The SFV rate design, on the other hand, fails to reward consumers’ conservation efforts because the fixed monthly customer charge must be paid regardless of whether the consumer reduces usage. This rate design vitiates the impact and benefit of reduced consumption.

Further, the SFV rate design prolongs the time (the payback period) it takes for investments in conservation and efficiency retrofits to pay for themselves in savings. R.C. 4905.70 charges the Commission with encouraging these kinds of retrofits and innovation.¹⁸ Thus, by discouraging consumers from investing in energy efficiency and conservation efforts, the Commission fails to adhere to state energy policy and ignores the duty that the General Assembly placed upon it through R.C. 4905.70.

R.C. 4911.15 allows the Consumers’ Counsel to represent consumers “whenever in [her] opinion the public interest is served.” The Consumers’ Counsel first intervened

¹⁸ R.C. 4905.70.

in this case to serve the public interest and moves to stay the Commission's order now for the same reason. The SFV rate design approved by the Commission below discourages conservation, rewards high consumption, and diminishes the value of energy efficiency investments to residential consumers. Moreover, it raises issues of fairness, as noted by Justice Pfeifer in the DEO and Duke appeals oral argument, by shifting costs between low-use and high-use customers within a customer class. A stay of that Order would thus serve the public interest by impeding the drastic move in 2010 to a total SFV rate design.

B. The OCC Has Provided A Strong Showing That It Is Likely To Prevail On The Merits.

The OCC provided substantial and appropriate evidentiary support for its positions while the case was pending at the PUCO, and will explain why it should prevail on the merits, in the merit brief it will file with this Court. The gravity of the errors presented, when fully weighed and addressed, make it likely that the OCC will prevail on the merits.

The errors complained of with respect to the SFV rate design are virtually identical to the errors described in the DEO and Duke appeals now pending before the Court. The errors pertain to questions of law and fact requiring a bifurcated standard of review. The question of law presented in the underlying appeal on SFV is as follows: Did the PUCO violate the state policy to promote and encourage conservation as required by R.C. 4929.02(A)(4) and state law under R.C. 4905.70 by imposing a rate design that encourages more gas usage instead of conservation? The question of fact presented pertaining to SFV is: When the PUCO implemented its fundamental change to how rates are collected from customers, departing from over thirty years of precedent and forsaking gradualism, did it show that the need for a drastic change was clear and that its prior

decisions on rate design were in error? These are the very same errors complained of in the pending appeals related to DEO and Duke.

There are also questions of law associated with the sufficiency of notice, similar to the issues presented in the DEO and Duke appeal.¹⁹ The issue presented by the instant appeal on notice are questions of law: Did Vectren provide adequate legal notice of the new rate design, as required under R.C. 4909.18 and 4909.19, and was the notice sufficient to ensure that the due process rights of customers, under the U.S. Constitution, were met?

Accordingly, for these issues of law, this Court has complete, independent power of review, while the issue of fact is held to a standard requiring reversal if the finding of the PUCO is manifestly against the weight of evidence.²⁰ Specifically, R.C. 4903.13 (Appx. 000002) provides this Court with authority to reverse, vacate, or modify a Commission order where the Court finds that order unlawful or unreasonable. Here OCC can show that the order is unlawful because it violates provisions of the Revised Code and the U.S. Constitution. On the singular factual issue related to SFV, OCC can show

¹⁹ Whether the notice is sufficient under R.C. 4909.18 and 4909.19 will turn upon the Court examining Vectren's actual notice to customers. The notice issues presented in the Duke and DEO appeal, though also pertaining to sufficiency of notice, are factually different. In the Duke and EDO appeals, neither Duke nor DEO provided any notice of SFV to customers, as the SFV proposal was not part of their original rate case filing. Here, the SFV was part of Vectren's original rate case filing, but Vectren failed to explain the substance and prayer of the SFV, including Stage 2 rates, to customers. Hence, the issues are similar, although not identical, due to the underlying factual differences.

²⁰ *Consumers' Counsel v. Pub. Util. Comm.* (1983), 4 Ohio St.3d 111,112, 447 N.E.2d 749.

the PUCO failed to justify its radical change to rate design, amounting to a finding that was against the weight of evidence. When these errors are fully weighed and addressed, it is likely that OCC will prevail on the merits.

Specifically, R.C. 4903.13 provides this Court with the authority to reverse, vacate, or modify a Commission order where the Court finds that order unlawful or unreasonable. Without repeating arguments to be made in their entirety in OCC's Merit Brief, OCC will show that the order is unreasonable and unlawful on four independent bases.

1. The Commission's Order Is Unlawful And Unreasonable Because It Approves A Rate Design That Fails To Promote Energy Efficiency And Discourages Conservation, Thus Violating R.C. 4929.02 And 4905.70.

R.C. 4929.02(A)(4) and 4905.70 require the Commission to approve rates that promote energy efficiency and encourage conservation in accordance with Ohio law and policy. The rate design ordered by the PUCO works against both energy efficiency and conservation. The SFV rate design penalizes energy-efficient consumers in two ways. First, the payback periods for any energy efficiency investments under the SFV rate design are extended. Second, the cost per unit of consumption increases for low-use customers and decreases as consumption rises, resulting in the low-use customers subsidizing the high-use (and potentially less efficient) customers. Therefore, the SFV rate design does not encourage conservation and violates R.C. 4905.70.

This Court has found that violations of statutes containing state policy warrant a reversal of the Commission's Order and remand to remedy the statutory violation.²¹ R.C. 4929.02(A)(4) declares the policy of the State of Ohio is to "[e]ncourage innovation and market access for cost-effective supply-and demand-side natural gas services and goods." The SFV rate design sends consumers the wrong price signal, directly violating that policy. SFV rate design harms those who have invested in energy efficiency by extending the payback period, and takes away control that consumers have over their utility bills. Thus, the SFV rate design fails to promote energy efficiency and encourage conservation, which is contrary to state policy and violates R.C. 4929.02(A)(4). OCC can, therefore, show that the Order to implement the SFV rate design violates statute and policy and is therefore unlawful and unreasonable.

2. The Commission's Order Is Unlawful And Unreasonable Because It Deviates From Precedent And The Commission Demonstrated Neither A Clear Need To Change Its Position Nor Error In Prior Decisions.

Decisions of this Court prevent the Commission from changing its position without appropriate considerations. In *Office of Consumers' Counsel v. Public Utilities Commission*, this Court stated "* * * Although the Commission should be willing to change its position when the need therefore is clear and it is shown that prior decisions are in error, it should also respect its own precedents in its decisions to assure

²¹ *Elyria Foundry Company v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 305, 317, 871 N.E.2d 1176. (In the *Elyria Foundry* Case, a violation of R.C. 4928.02 (G), a statute mandating state policy against anticompetitive subsidy relative to competitive retail electric service, was found.)

predictability which is essential in all areas of the law, including administrative law.”
(Emphasis added.)²²

The Commission’s Order here fails to show either a need for a change from its previous ratemaking policy or that the policy was in error. By imposing the SFV rate design on Vectren’s residential customers, the Commission ignored thirty years of cases supporting a rate design comprised of a low customer charge with a volumetric charge for usage. Also strewn aside by the Commission was its historic philosophy which embraced the regulatory principle of gradualism. This flagrant disregard for prior precedents has permitted the PUCO to institute a rate design that dramatically changes rates paid by customers, with customers now being forced to pay huge increases in the monthly fixed unavoidable customer charge. This shift in the design of rates is monumental – it is significantly greater than ever contemplated by the PUCO.

The Commission’s Order neither explains its rationale for ignoring principles of gradualism nor justifies disregarding thirty years of Commission rate design precedent. Thus OCC can demonstrate that the Commission’s Order abandons precedent pertaining to the design of rates and the policy of gradualism without showing that there is a clear

²² *Office of Consumers’ Counsel v. Pub. Util. Comm.* (1984), 10 Ohio St.3d 49, 50, 461 N.E.2d 303, quoting *Cleveland Electric Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d. 431, 330 N.E.2d 1. See also *State, ex rel. Auto Machine Co. v. Brown* (1929), 121 Ohio St. 73, 166 N.E. 903; *Atchison v. Wichita Bd. of Trade* (1973), 412 U.S. 800, 806, 93 S.Ct. 2367 (In 1973 the U.S. Supreme Court set a limit on the power of federal agencies to change prior established policies stating that, while an agency may flatly repudiate its norms, “whatever the ground for the departure [whether it is completely disregarding a policy or simply narrowing its applicability] * * * it must be clearly set forth so that the reviewing court may understand the basis of the agency’s action and so may judge the consistency of that action with the agency’s mandate.”); *Williams Gas Processing v. FERC* (C.A.D.C. 2006), 475 F.3d 319, 326 (The Court further added that, although not bound by precedent, a demonstration of “reasoned decision-making necessarily requires consideration of relevant precedent.”).

need for such change or that previous decisions were in error. The Commission's Order, therefore, is unlawful and unreasonable under this Court's precedent.

3. The Commission's Order Is Unlawful And Unreasonable Because It Violates The Notice Requirements Imposed By R.C. 4909.18 And 4909.19.

The General Assembly enacted R.C. 4909.18 and 4909.19 in order to provide customers with an opportunity to protect their interests in state regulation of the rates of public utilities. The legal requirements imposed by these statutes can be neither waived nor ignored by the PUCO. Because the PUCO failed to enforce these provisions, Vectren's customers had no adequate notice of the Stage 2 rates proposed by Vectren. Thus, OCC can demonstrate that the Commission's failure to adhere to the law results in an unreasonable and unlawful Order.

4. The Commission's Order Is Unlawful And Unreasonable Because Vectren Failed To Provide Adequate Legal Notice Of The Stage 2 Rates, Violating Customers' Due Process Rights Under The 14th Amendment To The U.S. Constitution.

"The fundamental requisite of due process of law is the opportunity to be heard."²³ Due process for individuals is a constitutional right protected by the Fourteenth Amendment. (Appx. 000027). The opportunity to be heard can have no meaning however, if one is not informed of the issues in contention and consequently can not make a decision as to whether to challenge or object to a matter.²⁴

²³*Grannis v. Ordean* (1914), 234 U.S. 385, 394, 43 S.Ct. 779, 58 L.Ed.1363, citing *Louisville & N.R. Co. v. Schmidt* (1990), 177 U.S. 230, 236, 20 S.Ct. 620; 44 L.Ed.747; *Simon v. Craft* (1901), 182 U.S. 427, 436, 20 S.Ct. 620; 44 L.Ed. 747.

²⁴ See for example *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 313, 70 S.Ct. 652, 94 L. Ed. 865, where the Court noted that "[t]he right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest."

Since Vectren's notice did not sufficiently inform its customers of the issues in contention, including the Stage 2 rates, VEDO's customers were unable to make a decision as to whether to challenge or object to the matter. Customers' opportunity to be heard could not be assured under such circumstances. Consequently, customers' rights to due process, in the form of an opportunity to be heard, were violated.

C. Irreparable Harm Will Be Suffered By Residential Customers In The Absence Of Action By This Court.

Harm is irreparable "when there could be no plain, adequate and complete remedy at law for its occurrence and when any attempt at monetary restitution would be 'impossible, difficult, or incomplete.'"²⁵ In the context of judicial orders, this Court traditionally looks to the lack of an effective legal remedy to determine whether to allow an interlocutory appeal to stay the proceedings.²⁶ The SFV rate design irreparably harms Vectren's low-use and low-income residential customers and warrants this Court granting the requested stay.

1. Ohio Law Provides No Plain, Adequate, And Complete Remedy For The Harm To Vectren's Customers If A Stay Is Not Granted.

a. There Is No Plain, Adequate, And Complete Remedy For The Lost Opportunities To Conserve.

Under Stage 2, the fixed monthly customer charge will increase to almost three times greater than what consumers were paying only a year ago. This drastic increase

²⁵ *FOP v. City of Cleveland* (2001), 141 Ohio App.3d 63, 81, 749 N.E.2d. 840 (citing *Cleveland v. Cleveland Elec. Illuminating Co.* (1996), 115 Ohio App.3d 1, 12, 684 N.E.2d 343, appeal dismissed (1977), 78 Ohio St.3d 1419).

²⁶ See, e.g., *Tilberry v. Body* (1986), 24 Ohio St.3d 117, 24 Ohio B. Rep. 308, 493 N.E.2d 954 and *Sinnott v. Aqua-Chem, Inc.* (2007), 116 Ohio St.3d 158, 2007-Ohio-5584, 876 N.E.2d 1217.

will discourage energy conservation and may, in fact, prompt customers to use more gas. Under this rate design, the cost per unit of gas consumed decreases as consumption increases. Such a rate design encourages consumption which negatively influences conservation decisions and energy efficiency efforts that can benefit consumers, reducing their utility bills and is so important to state and national energy concerns.

The SFV rate design may discourage residential customers from investing in energy efficient home improvements or from implementing conservation measures, because the new rate structure will not reward their investment. Certainly, conservation becomes less attractive to consumers if conserving does not reduce their gas bills or if the payback period for their investments in higher-priced insulation or energy efficient equipment is extended over a longer time period. These opportunities for conservation and the ensuing savings on customers' bills will be lost if a stay is not granted. There is no way to reach back and recover the energy that customers would have conserved under a different rate structure. That energy and the opportunity for savings will be lost forever, and no legal remedy will restore it.

b. The SFV Stage 2 Tariffs May Force Low-Use Customers To Migrate Off The System And Cause Irreparable Harm To Remaining Customers Who Will Be Responsible For The System Costs.

Other customers, primarily low-usage customers, may opt to discontinue service altogether if a stay is not granted maintaining the current rate structure. Indeed Vectren Witness Ulrey testified that he expects a number of customers to leave the system when the SFV rates are implemented.²⁷ That was the reason Vectren proposed seasonal rates, with lower customer charges during the summer and higher customer charges during the

²⁷ See Ulrey testimony, Tr. III at 93-94 (Appx. 000058).

winter. Vectren also proposed a pro forma adjustment to revenues to recoup approximately \$300,000 in revenues projected to be lost as low-usage customers leave the system.²⁸ Had Vectren been successful in its proposal, the “lost” revenue would have been recovered from Vectren’s remaining customers.

With a fixed customer charge of \$18.37 per month, a customer would have the incentive to discontinue service from April 1 to October 1 of the year, thereby saving almost \$110.23. When this is compared to the reconnect charges of \$60, there is a clear incentive for a customer to leave the system during the summer months, and come back in the winter.

Having created this potential problem, VEDO proposed a solution that included a non-cost based “avoided customer charge” for each month a customer was disconnected from the system. Although VEDO’s proposal was rejected, it illustrates the problems that are likely to ensue with the implementation of SFV. Vectren’s avoided customer charge was proposed to apply to customers who disconnect during the months where they were using little or no gas (summer months), and reconnect in winter, when their gas usage is substantial. This charge would have the effect of punishing customers -- including low-use and low-income customers -- who react to an almost tripling of their fixed customer charge by dropping off the system during the summer months when they use no gas.

Under VEDO’s proposed avoided customer charge, customers would have been charged a monthly customer charge even though they were disconnected and receiving no

²⁸ Neither of these proposals was adopted by the PUCO, nor were they incorporated into the overall revenue requirement agreed to in the filed Stipulation.

gas service. VEDO proposed that the disconnected customers pay a monthly customer charge of \$10.00 per month for May through October and \$16.75 per month, for up to three additional “winter” months (November through April).

Thus, VEDO’s own proposal recognizes the reality of the scenario raised by Justice Pfeifer in the oral arguments of the Duke and DEO appeal -- customers disconnecting from the system, and reconnecting months later, all in an attempt to avoid the consequences of SFV. This could lead to customers being forced to pay even higher rates in the future to make up for the lost contributions from customers who elected to leave the system, either temporarily or permanently -- all in the name of achieving an unlawful and unreasonable rate design.

Low-use, low-income customers may determine that the significantly higher fixed customer charge is too great a price to pay to have gas service. Even low-use higher income customers may reach the same conclusion. Vectren witness Ulrey estimates that there are potentially 3,000 customers who fall in the category of low-use customers that may leave VEDO’s system.²⁹ This could create almost \$661,320 in lost revenues, associated with Stage 2 customer charges.³⁰ The potential loss of customers would place an even greater burden on remaining customers who might then become responsible for the recovery of the costs associated with the facilities used to serve those customers no

²⁹ Id.

³⁰ \$18.37 per customer per month x 12 months = \$219.44 per customer per year x 3,000 customers = \$661,320.

longer taking gas service.³¹ Once these low-use customers leave the system, there is very little likelihood that they would ever return. It would be impossible to undo the harm from such losses.

c. There Is No Plain, Adequate, And Complete Remedy To Address The Violations Of The Notice Requirements Imposed By R.C. 4909.18, 4909.19, And Due Process Rights.

Ohio law requires that customers be provided actual notice of the utility's filing of a distribution rate increase. R.C. 4909.18 and 4909.19 are two provisions of the Revised Code that address the process a utility must follow when applying for an increase in rates. These provisions require that, among other things, a utility applying for a rate increase publish "the substance and prayer of its application" once a week, for three consecutive weeks, in generally circulated newspapers throughout the utility's service area. Vectren, however, did not provide customers with notice that conveyed the substance and prayer of its SFV rate design and the PUCO failed to enforce the notice requirements.

Specifically, Vectren's newspaper notice, advised that "VEDO proposes changes to the rate design for Rate 310 (Residential Sales Service) and Rate 315 (Residential Transportation Service) that initiate a gradual transition to a *straight fixed variable rate* for distribution service."³² Then VEDO provided the proposed rates and the average

³¹ See Tr. III at 93-96, where Vectren Witness Ulrey testified that the costs of approximately 3,000 customers leaving the system would be \$300,000. This estimate was based on Vectren's proposed seasonal customer charge, and not the \$18.37 per month, Stage 2 customer charge approved by the PUCO.

³² See VEDO Legal Notice of Publication, schedule S-3. (Emphasis added.) (Appx. 000029).

percentage increase in operating revenue requested on a rate schedule basis *but only for the proposed charges for Stage 1 rates*. The notice did not include any explanation of what “straight fixed variable rate for distribution service” means. Nor did the Company explain what changes to customer charge and volumetric rates would be made to “initiate a gradual transition” to the SFV rate for distribution service.

Moreover, nowhere in the notice is a “gradual transition” defined. Missing from the notice as well are the actual Stage 2 rates, the average proposed increase to customers under the Stage 2 rates, and the date at which the Stage 2 rates are to go into effect. Finally, the notice failed to advise customers of the Company’s end plan to move to a total SFV -- with no volumetric rates and a high unavoidable fixed customer charge -- the rate design the Commission ultimately approved much earlier than VEDO had proposed in filed testimony -- beginning in February 2010. Had Vectren’s notice provided its customers with accurate information and sufficient detail regarding the impact of the rate design that was sought, these customers would have had the opportunity to determine whether to speak out and to provide input to the PUCO -- input that the PUCO is legally obligated to consider as part of its review process. Customers however, were deprived of this opportunity due to the legally insufficient notice.

The General Assembly enacted R.C. 4909.18 and 4909.19 in order to provide customers with an opportunity to protect their interests. The legal requirements imposed by these statutes can be neither waived nor ignored by the Commission. Because the inadequate notice failed to give Vectren customers notice of the substance and prayer of the SFV rates, customers were denied their fundamental opportunity to be heard -- they were not made aware of how the proposed SFV rate design would impact their rates and

thus were unable to determine whether to participate in the case. This is a denial of their basic due process rights, guaranteed by the 14th amendment to the U.S. Constitution, and reinforced under R.C. 4909.18 and 4909.19. Since Vectren's notice did not sufficiently inform its customers of the issues in contention, in particular the proposed radical change in rate design, Vectren's customers were unable to make an informed decision to participate in the rate case. Customers' opportunity to be heard could not be assured under such circumstances. Consequently, customers' due process rights were violated.

Some courts have ruled that when the process is flawed or biased, this may be sufficient to warrant injunctive relief, if events subsequent to the process produce irreparable harm.³³ Such circumstances exist in this case. The lack of adequate notice under R.C. 4909.18, and 4909.19 caused the hearing process undertaken to be flawed. Vectren's customers were not given sufficient information to determine the impact of the proposed rate design on their individual bills. Therefore, the implementation of the SFV Stage 2 residential rates, which resulted from a proceeding in which the due process rights of consumers were violated, will result in harm to Vectren's residential customers for which there is no adequate remedy.

2. Any Attempt At Monetary Restitution For The Payment Of Unlawful And Unreasonable Rates Would Be Impossible, Difficult, Or Incomplete.

Economic loss is irreparable harm where that loss cannot be recovered. In *Tilberry v. Body*, this Court found that the effect of a court order calling for the dissolution of a business partnership would cause "irreparable harm" to the partners because "a reversal * * * on appeal would require the trial court to undo the entire

³³ *United Church of the Medical Center v. Medical Center Commission* (C.A.7, 1982), 689 F.2d 693, 701.

accounting and to return all of the asset distributions” - a set of circumstances that would be “virtually impossible to accomplish.”³⁴ In *Sinnott v. Aqua-Chem, Inc.* this Court found that a lower court’s pre-trial findings could be appealed at the point they were issued because the findings allowed the case to proceed to trial.³⁵ The majority reasoned that “the incurrence of unnecessary trial expenses is an injury that cannot be remedied by an appeal from a final judgment,”³⁶ and so concluded that “[i]n some instances, ‘[t]he proverbial bell cannot be unrung and an appeal after final * * * judgment on the merits will not rectify the damage’ suffered by the appealing party.”³⁷

Tilberry and *Sinnott* illustrate that economic harm does become irreparable where the loss cannot be recovered. No post-judgment remedy could have restored the unnecessary trial expenses to the corporation in *Sinnott*. And recovery of partnership distributions after dissolution in *Tilberry* would have been “virtually impossible.” For Vectren’s low-use residential consumers affected by the Commission’s Order here, any recovery subsequent to a successful appeal is highly unlikely. This is because the Company can be expected to argue (and the Court can be expected to rule) that recompensing consumers is barred by Ohio law. Thus, it will be argued that any

³⁴ *Tilberry*, 24 Ohio St.3d at 121.

³⁵ *Sinnott*, 116 Ohio St.3d at 164.

³⁶ *Id.* at 163.

³⁷ *Id.* at 162 (quoting *Gibson-Myers & Assocs. v. Pearce* (Oct. 27, 1999), Summit App. No. 19358, unreported (compelled disclosure of a trade secret would “surely cause irreparable harm”)). (Appx. 000097).

compensation to Vectren customers amounts to retroactive refunding of overpayments by customers where such payments are not made subject to refund.³⁸

This Court expressed this principle in its landmark holding in *Keco Industries, Inc. v. Cincinnati and Suburban Bell Tel. Co.*, where it limited retroactive ratemaking, according to its interpretation of R.C. 4905.32: “Under this section a utility has no option but to collect the rates set by the Commission and is clearly forbidden to refund any part of the rate collected.”³⁹

Pursuant to the Commission’s order and the schedule imposed therein,⁴⁰ Vectren raised its fixed monthly customer charge from \$7.00 to \$13.37 on February 22, 2009. Vectren will raise its customer charge to \$18.37 on February 22, 2010 and there will be no charges for gas used. It is this Stage 2 increase that OCC asks the Court to stay.

The incremental increases in the customer charge that will be imposed in February cannot be recovered once they are paid. Without a stay, the next stage of the fixed monthly customer charge will cause Vectren’s low-use residential customers to suffer more irreparable harm in the event that OCC prevails on appeal to this Court. The subsidy or shift of revenue responsibility between low-use residential customers and high-use residential customers will not be able to be recouped absent a finding of some exception to *Keco*.

³⁸ See, e.g., *Lucas County Commissioners v. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344, 1997 Ohio 112, 686 N.E.2d 501; *Keco Indus. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, ¶2 of the syllabus, 2 O.O.2d 85,141 N.E.2d 465.

³⁹ *Keco*, supra note 41, at 257. If the Court denies a stay, then Movants reserve their rights to later argue for a refund, such as in the event the Court overturns the PUCO’s decision.

⁴⁰ *In the Matter of the Application of Vectren Energy Delivery of Ohio Inc. to Increase its Natural Gas Rates*, Case No. 07-1080-GA-AIR et al., Opinion and Order at 15 (January 7, 2009).(R. 114).

D. Vectren Will Suffer No Substantial Harm As A Result Of This Court's Stay Of The Order.

In this case OCC is only objecting to the rate design and deficient notice -- not to the total revenues that Vectren is authorized to collect from residential customers. Vectren's rates are designed to provide Vectren with the opportunity to collect its authorized revenue requirements whether under Stage 1 or Stage 2 of its approved Residential Tariffs. However, as Vectren transitions from Stage 1 to Stage 2 of its SFV rate design, it collects more of the revenue requirement through the fixed monthly customer charge than through the volumetric charge. The following chart demonstrates the shift from volumetric rate collection to fixed rate collection that has occurred since the tariffs were approved, with the "Prior Tariff" referring to existing rates prior to the PUCO Order under appeal.

	Monthly Residential Customer Charge	Annual Number of Residential Bills⁴¹	Residential Revenues Collected through Customer Charge	Revenue Shift from Volumetric to Fixed Customer Charge
Prior Tariff	\$7.00	3,470,666	\$24,294,662	N/A
Stage 1	\$13.87	3,470,666	\$48,138,137	\$23,843,475 ⁴²
Stage 2	\$18.37	3,470,666	\$63,756,134	\$39,461,472 ⁴³

⁴¹ *In the Matter of the Application of Vectren Energy Delivery Inc. for an Increase In its Natural Gas Rates*, PUCO Case No. 07-1080-GA-AIR, et al., Application at E-4.1 page 1 of 32 (annual number of RS bills, 2,674,136), and E-4.1 at page 3 of 32 (annual number of RT bills, 796,530) (November 20, 2007). (R. 15).

⁴² \$48,138,137 – 24,294,662 = \$23,843,475.

⁴³ \$63,756,134 – 24,294,662 = \$39,461,472.

As described above, granting the stay of execution would freeze the rate design at Stage 1, while still allowing Vectren the opportunity to continue to collect its approved revenue requirements. This ensures the Company will not suffer any substantial harm due to the stay of execution. The Company would merely miss the opportunity to collect approximately \$16 million more of its authorized revenues through a fixed monthly customer charge. The Company will nevertheless have the opportunity to recover that \$16 million in authorized revenues but through volumetric charges in lieu a solitary, higher fixed charge. Thus, the staying of Stage 2 rates, allowing for Stage 1 rates to continue, ensures the Company will not suffer substantial harm due to the stay. The irreparable harm to Vectren's residential customers, however, as described below, is exacerbated as the fixed monthly customer charge increases and the volumetric rate disappears. And it is that harm that is substantial and irreparable.

IV. NO BOND IS NECESSARY IN ORDER TO EFFECT THE STAY

A. No Bond Should Be Required To Be Posted By OCC, As The Court And The Commission Have Both Permitted Stays To Be Granted Without The Posting Of A Bond.

Both the Commission and this Court have granted a stay without requiring that a bond be posted in order to effect the stay. As recently as 2007, a Commission Examiner granted a motion to stay a PUCO Order sought by Verizon when no undertaking was filed, despite arguments that posting of bond was necessary under R.C. 4903.16.⁴⁴ There

⁴⁴ *In the Matter of the Petition of MCImetro Access Transmission Services LLC dba Verizon Access Transmission Services, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with United Telephone company of Ohio dba Embarq* (Aug. 24, 2007), PUCO Case No. 06-1485-TP-ARB, unreported. (App. 000073).

the Examiner ruled that the stay would be issued with no undertaking despite claims that “substantial dollars” were at risk if the stay was granted. Likewise, this Court, in *MCI Telecommunications Corp. v. Pub. Util. Comm.*⁴⁵ approved a stay of a PUCO order without the posting of a bond. In that case the movant was not a public entity, nor did it claim circumstances not requiring a bond. Under these precedents, this Court should grant OCC the stay without a bond.

B. Under R.C. 2505.12 The OCC Is A Public Officer Of The State And Need Not Give A Supersedeas Bond.

Ohio law provides for an exemption that should relieve OCC from having to post a bond or “execute an undertaking” as bonding is referred to in R.C. 4903.16 (Appx. 000003). This exemption is found under R.C. 2505.12 (Appx. 000001), which provides that a public officer is not required to post a supersedeas bond when acting in a representative capacity for the state. Specifically, R.C. 2505.12 (Appx. 000001) provides “An appellant is *not required to give a supersedeas bond* in connection with any of the following: (A) An appeal by any of the following: * * * (3) Any public officer of the state or of any of its political subdivisions who is suing or is sued solely in the public officer's representative capacity as that officer.”⁴⁶

According to R.C. 4911.06 (Appx. 000013), the Consumers' Counsel “shall be considered a state officer * * *.”⁴⁷ Furthermore, according to R.C. 4911.02 (Appx.

⁴⁵ In *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), a stay was granted in a utility case by the Ohio Supreme Court without the posting of a bond despite the fact that the appellant was not a public entity.

⁴⁶ R.C. 2505.12. (Appx. 000001) (Emphasis added).

⁴⁷ R.C. 4911.06. (Appx. 000013).

000012), the Consumers' Counsel may "institute, intervene in, or otherwise participate in proceedings in both state and federal courts * * * on behalf of the residential consumers."⁴⁸ Thus, in filing a request for a stay of execution, the Consumers' Counsel acts in a representative capacity and, as a public officer, is not required to post a supersedeas bond.

R.C. 4903.16 (Appx. 000003) was originally formulated to address stays applied for by utilities, not customers. It was intended to protect customers, not handicap the representative of such customers, as astutely recognized by Justice Herbert.⁴⁹

The original version of R.C. 4903.16 (Appx. 000017), (passed in 1911), limited the undertaking requirement to a "public utility or railroad." Specifically, Section 73 of H.325 (Appx. 000018), the predecessor to R.C. 4903.16 (Appx. 000003), contained the following language "[t]he condition of the undertaking shall be that the *public utility or railroad* shall refund to each of such users, public or private, the amount collected by it in excess of the amount which shall finally be determined it was authorized to collect."⁵⁰ This Court has noted that "[p]atently, Section 4903.16 Revised Code, was designed primarily to apply to a public utility which is dissatisfied with the rates or charges as ordered by the Public Utilities Commission."⁵¹ The focus in 1911 was on ensuring a refund for customers who were found to have been overcharged in the event the utility lost its appeal.

⁴⁸ R.C. 4911.02. (Appx. 000012).

⁴⁹ *City of Columbus v. Pub. Util. Comm.* (1959), 170 Ohio St. 105, 112, 163 N.E.2d 167.

⁵⁰ G.C. 614-70 (H.B. 89, 79th General Assembly, 1911) (Appx. 000018-000019)(Emphasis added).

⁵¹ *City of Columbus v. Public Utilities Commission of Ohio* (1959), 170 Ohio St. 105, 109, 163 N.E.2d 167.

Although later versions of the legislation changed to require the “plaintiff in error” to execute an undertaking,⁵² and later “the appellant” to execute the undertaking,⁵³ these changes came with other provisions including those that eventually were codified as R.C. 4903.17, 4903.18, and 4903.19. These provisions address how the stay is to be implemented, and how refunds are to be accomplished. Again these provisions are directed toward the situation where utilities, not customers, obtain a stay of the PUCO orders, and have been collecting sums in excess of amounts that would have been collected if the stay had not been granted. R.C. 4903.17 (Appx. 000004) addresses the circumstance under which a stay of a Commission order has been received by the utility, and the utility has collected in excess of the amount permitted by staying the order. R.C. 4903.18 (Appx. 000005) speaks to a utility obtaining a stay of an order that would have lowered the rates paid by customers, and establishes standards for the overcharges. R.C. 4903.19 (Appx. 000006) addresses how moneys collected under 4903.18 are to be distributed.

A review of the legislative history behind R.C. 4903.16 (Appx. 000003) thus warrants a different approach, one which was thoroughly discussed by Justice Herbert in his dissent in the *City of Columbus* case.⁵⁴ R.C. 2505.12 (Appx. 000001) should be read in pari materia with Section 4903.16, as Justice Herbert judiciously opined. Doing so

⁵² G.C. 614-550 (H.B. 582, (Ohio 1913). (Appx. 000020).

⁵³ G.C. 614-548 (H.B. 42, (Ohio 1935). (Appx. 000024).

⁵⁴ *City of Columbus v. Pub. Util. Comm.* (1959), 170 Ohio St. 105, 112, 163 N.E.2d 167.

will permit the statute to be viewed in a manner to carry out the legislative intent of R.C. 4903.16.⁵⁵

The legislative intent of R.C. 4903.16 was that customers should be protected from paying increased rates pending an appeal filed at the Ohio Supreme Court. Reading R.C. 2505.12 in pari materia with R.C. 4903.16 fulfills this legislative intent. It also allows OCC, a statutory representative of residential customers⁵⁶ to obtain a stay to protect its customers without posting a bond -- something it has no ability to do, beyond a nominal bond.

By reading R.C. 2505.12 in pari materia with R.C. 4903.16, the statutory powers and duties of the OCC may be fulfilled and not inhibited. The powers and duties of OCC were specifically created by the Legislature when in 1976, OCC was appointed to represent residential customers in utility proceedings and the Consumers' Counsel was designated as a state officer.⁵⁷ Under R.C. 4911.02(B)(2)(c) (Appx. 000012), the Consumers' Counsel "may institute, intervene in, or otherwise participate in proceedings in both state and federal courts and administrative agencies on behalf of residential consumers concerning review of decisions rendered by, or failure to act by, the public utilities commission." Here, the ability to participate in the review of the PUCO decisions at the Ohio Supreme Court is hampered by strictly construing the earlier enacted provisions of R.C. 4903.16 to require Consumers' Counsel to post a bond.

⁵⁵ See *Benjamin v. Columbus* (1957), 104 Ohio App. 293, 4 O.O.2d 439, 148 N.E.2d 695, affirmed (1957), 167 Ohio St. 103, 4 O.O.2d 113, 146 N.E.2d 854; *In re Hesse* (1915), 93 Ohio St. 230, 112 N.E. 511.

⁵⁶ Notably, the Consumers Counsel was created in 1976, forty-one years after the amendments to R.C. 4903.16 and seventeen years after the *City of Columbus* case.

⁵⁷ See R.C. 4911.06 (Appx. 000013).

Clearly, the Legislature could not have intended the provisions of R.C. 4903.16 to inhibit the statutory power granted to the Consumers' Counsel forty-one years later.

That R.C. 4903.16 would be construed strictly and used to preclude any protections for customers by essentially denying them the opportunity to seek a stay, is antithetical to the policy underlying the statute and R.C. 4903.17, 4903.18, and 4903.19. And yet that is exactly what occurs. Consumers, unlike public utilities, do not have the financial means to enable them to post anything but nominal bonds. OCC, as a representative of residential consumers, does not have the means to post anything more than a nominal bond. As aptly noted by Justice Herbert in his dissent in *City of Columbus v. Pub. Util. Comm.*,⁵⁸ the Legislature never intended to handicap in this manner a municipality (or statutory representative of customers), seeking to protect its citizens who are consumers of public utility products.

Accordingly, this Court should read R.C. 2505.12 in pari materia with R.C. 4903.16 and conclude that OCC is not required to post a bond because the OCC is acting in a representative capacity as a public officer of the state and thus under R.C. 2505.12 is exempt from posting bond.

C. No Bond Is Required Because R.C. 4903.16 Is Unconstitutional Under The Separation Of Powers Doctrine.

Contrary to the separation of powers and if the statute is interpreted to require customers to post a bond in order to obtain a stay, the legislature has encroached on the Ohio Supreme Court's ability to decide a Motion to Stay. This has occurred through the bonding requirement of R.C. 4903.16 (App. 000003) -- associated with a Motion to Stay.

⁵⁸ *City of Columbus v. Pub. Util. Comm.*, 170 Ohio St. 105, 112, 163 N.E.2d 167.

R.C. 4903.16 provides that a proceeding to modify an order of the PUCO does not stay execution of the order, unless the appellant applies for a stay.⁵⁹

If the appellant does apply for a stay, the appellant, upon three days notice to the commission, “shall execute an undertaking* * * in such a sum as the Supreme Court prescribes* * * conditioned for the prompt payment by appellant of all damages caused by the delay in the enforcement of the order.”⁶⁰ The PUCO and utilities have argued that R.C. 4903.16 (Appx. 000003) is exclusively applicable to stays of PUCO orders and requires a bond to be posted before a stay may be granted by this Court.

The requirement that opposing parties in the past have proposed for the posting of a bond would adversely affect a non-utility party’s ability to obtain a stay. In fact, the bond requirement, if applied as proposed by opposing parties, would essentially write the stay provision out of the law as far as protecting consumers. But such a result is not an appropriate limitation on the Court’s powers to act to protect appellants. As explained below, R.C. 4903.16 (Appx. 000003) is unconstitutional because it violates the separation of powers doctrine and, therefore, should not apply to the current Motion for a Stay of Execution filed by the OCC in these proceedings.

The separation of powers doctrine prevents the distinct branches of government from exercising the core functions of another. Although the Ohio Constitution does not explicitly contain a separation of powers doctrine, Ohio courts have nevertheless held that it is inherent in the constitutional framework of the government.⁶¹ This Court has

⁵⁹ R.C. 4903.16. (Appx. 000003).

⁶⁰ R.C. 4903.16. (Appx. 000003).

⁶¹ *State v. Sterling* (2007), 113 Ohio St.3d 255, 2007-Ohio-1790, 864 N.E.2d 630, at ¶22 (citing the Ohio Constitution); *State ex. rel. Bryant v. Akron Metro Park Dist.* (1929), 120 Ohio St. 464, 473, 166 N.E. 407.

previously explained the separation of powers doctrine. The doctrine establishes the concept that powers properly belonging to one of the branches of government ought not to be directly and completely administered by other branches of government. Further, none of the branches of government ought to possess directly or indirectly an overruling influence over the others.⁶²

Because this Court has stated that the three divisions of the government must be protected from encroachments by the others,⁶³ any attempt by the one branch to exercise or limit power or encroach upon another branch's exercise of power is unconstitutional because it violates the separation of powers doctrine.⁶⁴ The power to grant or deny stays is inherent within a court's jurisdiction, and essential to the orderly and efficient administration of justice, this Court has held.⁶⁵ Thus, the Court has emphasized that the power to grant or deny stays is one exclusively belonging to the judiciary upon which the legislature cannot encroach.

Furthermore, the legislature is not even entitled to impose limitations on the inherent power of the judiciary to grant or deny stays. As this Court has recently stated "it is not within the purview of the legislature to grant or deny the power nor is it within the

⁶² *State ex. rel Bryant v. Akron Metro Park Dist.* (1929), 120 Ohio St. 464, 473, 864 N.E.2d 630.

⁶³ *Sterling* at ¶25 (quoting *Fairview v. Giffey*) (1905), 73 Ohio St. 183, 187, 166 N.E. 407).

⁶⁴ *Hale v. The State* (1896), 55 Ohio St. 210, 212-13, 45 N.E. 199; *State v. Sanders* (Sept. 29, 1995), Miami App. No. 95-CA 11, 95-CA 12, unreported. (App. 00076).

⁶⁵ *State v. Hoechhausler* (1996), 76 Ohio St.3d 455, 464, 1996 Ohio 374, 668 N.E.2d 457; *Landis v. N. American Co.* (1936), 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153; *State v. Smith* (1989), 42 Ohio St.3d 60, 61, 537 N.E.2d 198; *City of Norwood v. Horney* (2006), 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115.

purview of the legislature to shape or fashion circumstances under which [a stay of power] may be or may not be granted or denied.”⁶⁶

If R.C. 4903.16 (Appx. 000003) is construed to require non-utilities to post a bond to obtain a stay from a PUCO order, then the judicial power of this Court is being encroached upon. This occurs because the judicial power to grant a stay is being shaped or fashioned to circumstances under which this Court can act. If the appellant, OCC, cannot post the legislatively mandated bond, then opposing parties will argue that this Court is without power to grant the Stay of Execution. Moreover, the OCC will be left without a means to protect the customers it represents from irreparable harm during the pendency of an appeal.

Thus, the legislative requirement found in R.C. 4903.16 et seq. is unconstitutionally shaping the circumstances under which this Court can exercise its power to grant stays. This violates the separation of powers doctrine as reflected in Ohio law. For these reasons, R.C. 4903.16 (Appx. 000003) is unconstitutional under the separation of powers doctrine and cannot be applied to require OCC to execute an undertaking in order to receive a stay of PUCO Orders.

D. If OCC Is Required To Post A Bond, The Bond Should Be Set At A Nominal Amount.

An examination of R.C. 4903.16 shows that the Court is not confined in its discretion in prescribing the sum to be fixed in the bond undertaking of an appellant. Indeed the statute describes conditioning the bond for repayment of monies in excess of the charges fixed by the order appealed from. This statute clearly contemplates an appeal

⁶⁶ *City of Norwood*, at ¶120.

by a utility from PUCO order reducing rates—not an appeal by a customer from an order increasing rates. There is no comparable statute where a customer appeals from an order of the PUCO fixing higher rates.

In order to fairly protect all parties affected by an order of the Commission, the Court could establish a nominal bond, such as \$25, that OCC could afford to meet. This would enable the Court to comply with the statute, if the interpretation is that a bond is required, without making a determination that OCC is exempt from posting a bond, or that the statute is an unconstitutional violation of separation of powers.

As described above, Vectren's rates are currently designed to collect its full revenue requirement under the approved Residential Tariffs. The stay of execution means that the current tariff for collecting that revenue requirement will continue to be collected. This ensures the Company will not sustain any substantial harm due to the stay of execution. Accordingly, no bond is necessary in order to effect a stay.

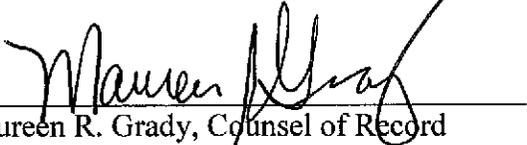
V. CONCLUSION

The SFV rate design will discourage conservation and investment in energy-efficient home improvements, contrary to R.C. 4929.02 and 4905.70. It will cause irreparable harm to residential consumers by forcing low-use customers to subsidize high-use customers -- and at rates that no customer will be able to recover even if this Court finds the PUCO's Order unlawful or unreasonable on OCC's appeal. For these reasons, this Court should stay execution of the Commission's Order that authorizes the full SFV rate design to be implemented on February 22, 2010, until it has decided this appeal. Finally, no bond is necessary in order to effectuate the stay. But if this Court

requires a bond to be posted in order to effect the stay, the bond should be nominal in amount since there will be no financial harm to the Company.

Respectfully submitted,

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EXHIBIT A

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Vectren)
 Energy Delivery of Ohio, Inc., for Authority)
 to Amend its Filed Tariffs to Increase the) Case No. 07-1080-GA-AIR
 Rates and Charges for Gas Services and)
 Related Matters.)

In the Matter of the Application of Vectren)
 Energy Delivery of Ohio, Inc., for Approval)
 of an Alternative Rate Plan for a)
 Distribution Replacement Rider to Recover)
 the Costs of a Program for the Accelerated) Case No. 07-1081-GA-ALT
 Replacement of Cast Iron Mains and Bare)
 Steel Mains and Service Lines, a Sales)
 Reconciliation Rider to Collect Differences)
 between Actual and Approved Revenues,)
 and Inclusion in Operating Expenses of the)
 Costs of Certain Reliability Programs.)

In the Matter of the Application of Vectren)
 Energy Delivery of Ohio, Inc., for)
 Continued Accounting Authority to Defer) Case No. 08-632-GA-AAM
 Differences between Actual Base Revenues)
 and Commission-Approved Base Revenues)
 Previously Granted in Case No. 05-1444-)
 GA-UNC and Request to Consolidate with)
 Case No. 07-1080-GA-AIR.)

OPINION AND ORDER

The Commission, considering the above-entitled applications, hereby issues its opinion and order in this matter.

APPEARANCES:

McNees, Wallace & Nurick, LLC, by Samuel C. Randazzo, Gretchen J. Hummel, Lisa McAlister, and Joseph M. Clark, 21 East State Street, 17th Floor, Columbus, Ohio 43215-4228, and Lawrence K. Friedeman, Vice President and Deputy General Counsel, P.O. Box 209, Evansville, Indiana 47709-209, on behalf of Vectren Energy Delivery of Ohio, Inc.

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Sheryl Creed Maxfield, First Assistant Attorney General of the state of Ohio, by Duane W. Luckey, Section Chief, and Werner L. Margard III and Anne L. Hammerstein, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Maureen R. Grady Joseph P. Serio, and Michael E. Idzkowski, Assistant Consumers' Counsel, office of the Ohio Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215, on behalf of residential utility consumers of Vectren Energy Delivery of Ohio, Inc.

David C. Rinebolt, 231 West Lima Street, P.O. Box 1793, Findlay, Ohio 45839-1793, on behalf of Ohio Partners for Affordable Energy.

Vorys, Sater, Seymour & Pease, LLP, by W. Jonathan Airey and Gregory D. Russell, 52 East Gay Street, Columbus, Ohio 43216-1008, on behalf of Honda of America Mfg., Inc.

Chester, Willcox & Saxbe, LLP, by John W. Bentine and Mark S. Yurick, 65 East State Street, Suite 1000, Columbus, Ohio 43215-4213, and Vincent A. Parisi, General Counsel, 5020 Bradenton Avenue, Dublin, Ohio 43017, on behalf of Interstate Gas Supply, Inc.

John M. Dosker, General Counsel, 1077 Celestial Street, Suite 110, Cincinnati, Ohio 45202-1629, on behalf of Stand Energy Corporation.

Trent A. Dougherty, Director of Legal Affairs, 1207 Grandview Avenue, Suite 201, Columbus, Ohio 43212-3449, on behalf of the Ohio Environmental Council.

OPINION:

I. History of the Proceedings

Vectren Energy Delivery of Ohio, Inc., (VEDO or the Company) is a natural gas company as defined in Section 4905.03(A)(6), Revised Code, and a public utility as defined in Section 4905.02, Revised Code. As such, VEDO is subject to the jurisdiction of the Public Utilities Commission in accordance with Sections 4905.04 and 4905.05, Revised Code.

On November 20, 2007, VEDO filed applications for an increase in gas distribution rates and for approval of an alternative rate plan. A technical conference regarding VEDO's applications was held on February 5, 2008.

On May 23, 2008, VEDO filed an application for continued accounting authority to defer differences between actual base revenues and commission approved base revenues, as previously granted by the Commission.

A written report of the Commission staff's (Staff) investigation was filed on June 16, 2008. Objections to the Staff Report were timely filed by VEDO, the Ohio Consumers' Counsel (OCC), Honda of America Manufacturing, Inc. (Honda), Ohio Partners for Affordable Energy (OPAE), and the Ohio Environmental Council (OEC). Motions to intervene were filed by OCC, Honda, OPAE, OEC, Interstate Gas Supply, Inc. (IGS), and Stand Energy Corporation (Stand). Intervention was granted to these parties by the attorney examiner on August 1, 2008.

On July 18, 2008, a prehearing conference was held. The evidentiary hearing was held on August 19, 2008, through August 25, 2008, and on August 27, 2008, August 28, 2008, September 2, 2008, September 9, 2008, and September 15, 2008. Sixteen witnesses testified on behalf of VEDO, five witnesses testified on behalf of OCC, and five witnesses testified on behalf of Staff.

Local public hearings were held on September 3, 2008, in Sidney, Ohio; on September 4, 2008, in Dayton, Ohio; and on September 8, 2008, in Washington Court House, Ohio.

A stipulation (Stipulation) was filed on September 8, 2008, signed by VEDO, OCC, OPAE and Staff (Signatory Parties). Post-hearing briefs were filed by VEDO and Staff. A joint post-hearing brief was filed by OCC and OPAE. Reply briefs were filed by VEDO, Staff, OCC and OPAE.

II. Summary of the Stipulation

The Stipulation was intended by the Signatory Parties to resolve certain issues in this proceeding (Joint Ex. 1). The Stipulation includes, *inter alia*, the following provisions:

- (1) The Signatory Parties agree that VEDO should receive a revenue increase of \$14,779,153 with total annual revenues of \$456,791,425.
- (2) The Signatory Parties agree that the value of all of VEDO's property which is used and useful for the rendition of gas service to customers, as of the date certain of August 31, 2007, is \$234,839,282.
- (3) The Signatory Parties agree that VEDO is entitled to a rate of return of 8.89 percent.

- (4) The proposed tariffs attached to the Stipulation as Stipulation Exhibit 2 should be approved by the Commission and be effective for all services rendered after the date final approved tariffs are filed with the Commission.
- (5) The stipulated revenue requirement includes \$4 million in customer-funded energy efficiency programs, of which \$1.1 million is allocated to low-income weatherization funding. The Signatory Parties further agree to the establishment of an Energy Efficiency Funding Rider (EFFR), initially set at \$0.00, applicable to Rate Schedules 310, 315, 320 and 325. The Signatory Parties also agree that the Vectren Collaborative, originally established in *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC, Supplemental Opinion and Order (June 28, 2007), will monitor the implementation of the energy efficiency programs approved as proposed in the application in this case and, at least annually, will consider and make recommendations regarding additional program funding, as well as reallocation of funding among programs. The Company will submit, and the Collaborative will support, an application to establish an EFFR charge to provide a minimum of \$1 million to be used to continue funding for the low-income weatherization program for customers whose income is between 200 percent and 300 percent of the poverty level.
- (6) The Signatory Parties agree that the Sales Reconciliation Rider-A proposed by the Company to recover the deferral amount authorized in Case No. 05-1444-GA-UNC should be approved and that the initial rate should be set at the rate contained in Stipulation Exhibit 2 (Joint Ex. 1, Stipulation Ex. 2).
- (7) The Signatory Parties agree that the Commission should provide the Company with accounting authority to continue deferring for future recovery the difference between weather-normalized actual base revenues and Commission-approved base revenues in the same manner as previously authorized in Case No. 05-1444-GA-UNC, as requested in Case No. 08-632-GA-AAM, and that such deferred amounts should be recovered by Sales Reconciliation Rider-A.
- (8) The Company agrees to continue funding the low-income conservation program created pursuant to Case No. 05-1444-

GA-UNC, from October 1, 2008, until the effective date of rates approved in this proceeding.

- (9) The Signatory Parties agree that the Company should be authorized to establish a Distribution Replacement Rider (DRR) to enable the recovery of and return on investments made by the Company to accelerate implementation of a bare steel and cast iron main replacement program at a pre-tax rate of return of 11.67 percent. The DRR shall be in effect for the lesser of five years from the effective date of rates approved in this proceeding or until new rates become effective as a result of the filing by the Company of an application for an increase in rates under Section 4909.18, Revised Code, or the filing of a proposal to establish rates pursuant to an alternative method of regulation under Section 4929.05, Revised Code.
- (10) The Signatory Parties agree that the revenue distribution shown on Stipulation Exhibit 5 (Joint Ex. 1, Stipulation Exhibit 5) shall be used to develop rates and charges ultimately approved by the Commission in this proceeding.
- (11) The Signatory Parties agree that the rate design issues associated with rate schedules 310 and 315 are not resolved by the Stipulation and will be fully litigated and submitted to the Commission for its consideration and resolution.
- (12) The Stipulation resolves all contested issues raised in Case Nos. 07-1080-GA-AIR, 07-1081-GA-ALT, 05-1444-GA-UNC and 08-632-GA-AAM, except for those issues specifically identified as being reserved for separate resolution by means of litigation or otherwise.

III. Evaluation of the Stipulation

Rule 4901-1-30, Ohio Administrative Code, authorizes parties to Commission proceedings to enter into stipulations. Although not binding on the Commission, the terms of such agreements are accorded substantial weight. See *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St. 3d 123, 125 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St. 2d 155 (1978). This concept is particularly valid where the stipulation is supported or unopposed by the vast majority of parties in the proceeding in which it is offered.

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. See, e.g., *Dominion Retail v.*

Dayton Power and Light, Case Nos., 03-2405-EL-CSS et al., Opinion and Order (February 9, 2005); *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR, Order on Remand (April 14, 1994); *Ohio Edison Co.*, Case Nos. 91-698-EL-FOR et al., Opinion and Order (December 30, 1993); *Cleveland Electric Illum. Co.*, Case No. 88-179-EL-AIR, Opinion and Order (January 31, 1989). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

- (1) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
- (2) Does the settlement, as a package, benefit ratepayers and the public interest?
- (3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St. 3d 547 (1997) (quoting *Consumers' Counsel, supra*, at 126). The Court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.

Based upon our three-prong standard of review, we find that the first criterion, that the settlement process involved serious bargaining by knowledgeable, capable parties, is met. Counsel for VEDO, OPAE, OCC and Staff have been involved in many cases before the Commission, including a number of prior cases involving rate issues. Further, a review of the terms of the Stipulation, and the schedules and tariffs filed with the Stipulation, shows that the parties engaged in comprehensive negotiations, resolving all outstanding issues except rate design (Staff Ex. 3a at 3).

The Stipulation also meets the second criterion. As a package, it advances the public interest by resolving a majority of issues raised in this proceeding without incurring the time and expense of further litigation. Moreover, the testimony in the record indicates that the Stipulation establishes a fair and reasonable revenue requirement with an increase in base rates of approximately 3.34 percent (Staff Ex. 3a at 3). At the hearing, Staff witness Puican testified that the stipulated rate of return of 8.89 percent includes a 25 basis point reduction to the return on equity component, in order to take into consideration the reduction in risk to the Company which may result from the Commission's adoption of one of the rate designs proposed by the Company, Staff, or OCC (Tr. IX at 11-12).

Further, the Stipulation extends shareholder funding of VEDO's low-income conservation program and provides for a significant expansion of funding for energy efficiency programs. The Stipulation provides for \$4 million in funding for energy efficiency programs, including \$1.1 million in funding for low-income weatherization programs. The Commission notes that the energy efficiency programs will be monitored on an ongoing basis by the Vectren Collaborative, which was first established under Case No. 05-1444-GA-UNC. The Stipulation also establishes a distribution system replacement program to accelerate the replacement of VEDO's aging distribution systems and provides for oversight of this program. Finally, the Stipulation establishes a program to address the safety concerns of prone-to-fail risers with a schedule to replace such risers and adopts a proposal for VEDO to assume ownership and repair responsibility for customer service lines (Staff Ex. 3a at 3-4).

Finally, the Stipulation meets the third criterion because it does not violate any important regulatory principle or practice (Staff Ex. 3a at 4).

Our review of the Stipulation indicates that it is in the public interest and represents a reasonable resolution of the issues in this case. The Commission finds the stipulated rate of return of 8.89 percent, requiring an increase of \$14,779,153 in revenues, to be fair, reasonable, and supported by the record and will adopt the stipulated revenue increase and rate of return for purposes of this proceeding. We will, therefore, adopt the Stipulation in its entirety.

IV. Rate of Return and Authorized Rates

The Signatory Parties stipulated to a net operating income of \$11,270,763 for the test year ending May 31, 2008. Application of this dollar return to the stipulated rate base of \$234,839,282 results in a rate of return of 4.80 percent. Such a return is insufficient to provide VEDO with reasonable compensation for the natural gas service it renders to its customers.

The parties have agreed to a recommended rate of return of 8.89 percent on a stipulated rate base of \$234,839,282, requiring a net operating income of \$20,877,212. Adding the stipulated revenue increase of \$14,779,153 to the stipulated test year revenues of \$442,012,272 produces a new revenue requirement of \$456,791,425, an increase of 3.34 percent (Joint Ex. 1, Stipulation Exhibit 1, Schedule A-1).

V. Rate Design

The Stipulation left the issue of rate design unresolved. VEDO has proposed a residential rate design that reflects gradual movement toward a straight fixed variable (SFV) rate design over a period of two rate case cycles. Because this two-step approach

would include a volumetric component in rates, the Company also proposes a transitional decoupling rider (SRR-B) which would recover the difference between the actual revenues collected under the proposed rates and the stipulated revenue requirement in this case (Co. Ex. 9b at 3-5).

According to VEDO, the evidence demonstrates that a rate design that recovers the fixed costs of providing distribution service through the customer charge is warranted, based on the goal of setting rates based upon the cost of providing service (Co. Ex. 9b at 5; Staff Ex. 3 at 8-9). VEDO notes that OCC's witness Coulton agreed that a basic principle of ratemaking is that rates should reflect costs and that one set of customers should not be charged for costs that a different set of customers caused a utility to incur (OCC Ex. 2 at 21-22). VEDO also contends that the record shows that a rate design that collects fixed costs through a volumetric charge provides customers with a misleading price signal about costs that can be avoided by reducing consumption (Co. Ex. 9b at 5, 8; Staff Ex. 3 at 4-5).

VEDO argues that, based on these traditional ratemaking principles, its proposal to establish a residential rate design based on implementation of full SFV has compelling advantages over any other proposal. VEDO notes that, if the Commission were to adopt a two-stage transition to a full SFV without the proposed decoupling rider, the rates at the stipulated revenue level would be an average year-round customer charge of \$16.04, with a volumetric charge that would produce the remainder of the residential revenue requirement in the first year, and an average year-round full SFV rate of \$18.37, with no volumetric charge, in the second year (Co. Ex. 9b at 11-13; Tr. VIII at 11).

OCC and OPAE argue that a decoupling mechanism with a low customer charge accomplishes the same goal and is superior to the SFV rate design because it sends appropriate price signals and allows customers to have better control over their gas bills. OCC and OPAE claim that a decoupling mechanism would retain the current lower fixed monthly charge of \$7.00; in contrast, OCC and OPAE claim that customers would not understand a structure based upon two seasonal charges, as proposed by the Company. OCC and OPAE believe that a decoupling mechanism such as the mechanism approved by the Commission in Case No. 05-1444-GA-UNC would protect VEDO from any decline in average use that was not weather-related. Moreover, OCC and OPAE contend that a traditional decoupling mechanism is superior to SFV because it is symmetrical and provides equal protection from changing sales volumes to both customers and the Company.

OCC and OPAE also claim that the SFV rate design sends the wrong price signal to consumers by telling customers that it does not matter how much they consume; their gas distribution bill will be relatively the same. OCC and OPAE claim that the SFV design does not encourage conservation because it reduces the volumetric rate while increasing

the fixed customer charge. OCC and OPAE allege that the SFV rate design would lengthen the payback for energy efficiency investments because a greater portion of the bill will be recovered through the fixed customer charge and a smaller portion of the bill through the volumetric charge. OCC notes that Staff witness Puican testified that charging a volumetric rate to recover fixed costs provides an artificial price signal (Tr. VI at 27-28), but OCC claims that, if the goal is to achieve maximum conservation, then the best price signal is one that includes the largest volumetric charge and the lowest fixed charge.

OCC and OPAE also claim that the adverse impacts of the SFV rate design on low-usage customers are also harmful to low-income customers because it requires them to pay more to subsidize high-volume users. OCC and OPAE cite to the testimony of OCC witness Coulton for the proposition that an SFV rate design has the effect of disproportionately increasing bills to low-income customers (OCC Ex. 2 at 31). OCC and OPAE argue that VEDO and Staff improperly assume the SFV rate design to be beneficial to low-income customers who are not on PIPP. OCC and OPAE rely upon the testimony of OCC witness Coulton, who testified that the average energy use of PIPP customers is higher than the average energy use of PIPP customers plus non-PIPP low-income customers. OCC and OPAE claim that this demonstrates that low-income customers are not high energy users (OCC Ex. 2 at 27).

OCC and OPAE argue that the PIPP population is not an appropriate surrogate for the entire low-income population because of the basic nature of the PIPP program which requires a household to pay a percentage of its income to the utility in order to maintain service. As a result, the PIPP program excludes a substantial number of households that have lower energy bills but are still low-income customers (OCC Ex. 2 at 27). Instead, OCC and OPAE rely upon the testimony of OCC witness Coulton, who claimed that lower income households use less natural gas than higher income households (OCC Ex. 2 at 30).

Further, OCC and OPAE claim that the Company and Staff proposals related to the customer charge violate the doctrine of gradualism. OCC notes that the Staff does not rely upon any formula or overriding principle when applying gradualism (Tr. VI at 36). OCC faults Staff for not providing a more transparent explanation for its support of the SFV rate design. OCC believes that a more gradual introduction of SFV is needed in order to lessen the impact on customers.

Finally, OCC and OPAE claim that the SFV rate design contradicts Ohio law. OCC and OPAE allege that the SFV rate design does not promote customer efforts to engage in the conservation of natural gas and instead encourages the increased usage of natural gas because the SFV rate design reduces costs for high-use customers (OCC Ex. 3 at 21). Thus, OCC and OPAE claim that the SFV rate design violates the state policy codified in Section 4929.02(A)(4), Revised Code.

VEDO responded to three issues raised by OCC: the price signal and its effect on conservation, the impact on low-income customers, and gradualism. With respect to price signals and their impacts on conservation, VEDO contends that conservation will reduce only the customer's commodity cost and that an appropriate and fair rate design will reflect precisely that and will permit a customer to make investment decision on a valid economic analysis. VEDO cites to the testimony of Staff witness Puican, who stated that:

Customers will always achieve the full value of the gas cost savings regardless of the distribution rate. . . . Artificially inflating the volumetric rate beyond its cost basis skews the analysis and will cause over-investment in conservation . . . which exacerbates the under-recovery of fixed costs that the utility must then recover from all other customers.

(Staff Ex. 3 at 3.)

VEDO also alleges that OCC and OPAE incorrectly argue that the interests of low-income customers must prevail in any conflict over rates among residential customers. In addition, VEDO claims that the evidence shows that a fully implemented SFV rate design benefits low-income customers and that the OCC and OPAE position will cause low-income customers to have higher bills (Co. Ex. 8a at 12-16). The Company notes that, although OCC's witness did testify that an SFV rate design would adversely impact low-income customers, the record demonstrates that the witness based his testimony on unreliable data (Co. Ex. 8a at 11). Instead, VEDO argues that it prepared a study demonstrating that PIPP customers, on average, use more gas than the average of all residential customers (Co. Ex. 8a at 17). Further, the Company notes that Staff witness Puican agreed that the usage data of PIPP customers was the best available proxy for all low-income customers (Staff Ex. 3 at 7; Tr. VI at 35). Moreover, the Company presented, on rebuttal, a study that the Company claims directly rebutted OCC's witness and demonstrated that low-income customers in VEDO's service area consume, on average, more natural gas annually than all but the highest income residential customers in its service area (Co. Ex. 8a at 12-14).

With respect to OCC's arguments concerning gradualism, VEDO notes that the stipulated revenue increase in this case for residential customers is only 4.42 percent. The Company contends that, because the Commission has held that gradualism must be considered in reviewing the overall increase rather than a specific component such as the customer charge, an overall increase of less than five percent does not violate the principle of gradualism. *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 04-571-GA-AIR, Entry on Rehearing (June 8, 2005) at 5.

Staff argues that the record in this case demonstrates that the SFV rates are reasonable, understandable, and send the proper price signal to customers. Staff contends

that the SFV rates follow cost-causation principles and reduce a subsidy that exists under current rates. Staff claims that the current rate design, which recovers most of the Company's fixed distribution costs through a rate that varies with usage, distributes more of the fixed costs to higher users of natural gas. Staff claims that SFV rates more evenly distribute fixed costs by increasing the portion of those costs recovered through a fixed rate component, thereby matching fixed and variable cost recovery with the costs actually incurred (Staff Ex. 3 at 4-5).

Staff further argues that the SFV rate design does not disproportionately impact low-income customers because the rate effects of the SFV rate design are not impacted by the income of individual ratepayers. Further, Staff believes that the record shows that many low-income customers would benefit from an SFV rate design. Staff contends that, based upon the higher usage levels of PIPP customers, many of these customers will benefit from the SFV approach (Staff Ex. 3 at 6-7).

Finally, Staff argues that the SFV rate design sends the appropriate price signal to customers. Staff claims that including fixed costs in a variable rate distorts price signals. Staff argues that, since SFV rate design aligns fixed costs with fixed rate components and variable costs with variable rate components, it provides better price signals for customers' investment decisions (Staff Ex. 3 at 4). Thus, Staff argues that, because the SFV rate design provides better information and results in more informed consumer decisions, it is a benefit, rather than a detriment, to consumers and conservation.

In three recent cases, the Commission has addressed the question of whether to adopt a levelized rate design (i.e., SFV), which recovers most fixed costs through a flat monthly charge, or a decoupling rider or sales reconciliation rider (SRR), which maintains a lower customer charge and allows the utility to offset lower sales through an adjustable rider. See *In re Duke Energy Ohio, Inc.*, Case No. 07-589-GA-AIR et al., Opinion and Order (May 28, 2008); *In re The East Ohio Gas Company, dba Dominion East Ohio*, Case No. 07-829-GA-AIR, et al., Opinion and Order (October 15, 2008); *In re Columbia Gas of Ohio, Inc.*, Case No. 08-72-GA-AIR, Opinion and Order (December 3, 2008). Consistent with our previous decisions, and recognizing that the stipulated rate of return includes a reduction to the return on equity to account for risk reduction associated with rate design change, the Commission finds, on balance, that a levelized rate design is preferable to a decoupling rider. Both methods address revenue and earnings stability issues in that the fixed costs of delivering gas to consumers will be recovered, regardless of whether consumption is reduced. Accordingly, both methods remove any disincentive to the utility to promote conservation and energy efficiency. However, a levelized rate design has the added benefit of producing more stable customer bills throughout the year because fixed costs will be recovered evenly throughout the year. In contrast, with the SRR proposed by OCC and OPAE, consumers would pay a higher portion of their fixed costs during the heating season when overall natural gas bills are already at their highest, and rates would be less

predictable because they are subject to annual adjustments to recover lower-than-expected sales.

Moreover, the levelized rate design has the advantage of being easier for customers to understand. Customers will see most of the costs that do not vary with usage recovered through a flat monthly charge. As we noted in *Duke* and in *DEO*, customers are accustomed to fixed monthly bills for numerous other services, such as telephone, trash collection, internet, and cable services. An SRR, on the other hand, is much more complicated and difficult to explain to customers. It would be difficult for customers to understand why they would have to pay more through a decoupling rider if they have worked hard to reduce their consumption; it may appear to customers that the utility is penalizing customers for their conservation efforts.

Moreover, as we noted in *DEO*, the Commission believes that a levelized rate design sends better price signals to consumers. The possible response of consumers to an increase in the customer charge, i.e. dropping gas service entirely and switching to a different fuel, is much less likely to occur than consumers changing their level of gas usage in response to a change in the volumetric rate. When a utility is entitled to recover costs in excess of its costs for providing the next increment of gas service, a more economically efficient rate design is one that recovers these additional costs largely through a change that has little impact on consumer behavior.

Customers will not be misled into believing that reductions in consumption will allow them to avoid the fixed costs of the distribution system, as feared by Staff. However, the commodity portion of a customer's bill, the actual cost of gas the gas used, will remain the biggest driver of the bill. In fact, commodity costs comprise 75 to 80 percent of the total bill (Tr. III at 68). Therefore, we believe that the gas usage will still have the biggest influence on the price signals received by customers when making gas consumption decisions and that customers will still receive the appropriate benefits of any conservation efforts.

Additionally, the provision of \$4 million in base rates for energy efficiency projects under the stipulation and its commitment for an additional \$1 million through a subsequent filing are critical to our decision in this case. The Commission has long recognized that conservation and efficiency should be an integral part of natural gas policy. To that end, the Commission has recognized that energy efficiency program designs that are cost-effective, produce demonstrable benefits, and produce a reasonable balance between reducing total costs and minimizing impacts on non-participants are consistent with Ohio's economic and energy policy objectives. In the Stipulation, the parties have agreed to fund energy efficiency programs for low-income customers as well as to convene a collaborative to monitor the implementation of energy efficiency programs approved as proposed in the application and to consider and make recommendations

regarding additional program funding or possible reallocation of funding among programs. We laud the parties for this agreement and we encourage VEDO to make cost-effective weatherization and conservation programs available to all low-income consumers and to ramp up such programs as rapidly as reasonably practicable. Furthermore, we encourage the collaborative to address additional opportunities to achieve energy efficiency improvements and to consider programs which are not limited to low-income residential consumers. As part of its review, the collaborative should develop energy efficiency program design alternatives and should consider those alternatives in a manner that strikes a balance between cost savings and any negative ratepayer impacts. The energy efficiency programs should also consider how best to achieve net total resource cost and societal benefits; how to minimize unnecessary and undue ratepayer impacts; how process and impact evaluation will be conducted to ensure that programs are implemented efficiently; how to capture what otherwise become lost opportunities to achieve efficiency improvements in new buildings; how to minimize "free ridership" and the perceived inequity resulting from the payment of incentives to those who might adopt efficiency measures without such incentives; and how to integrate gas energy efficiency programs with other initiatives. The Commission directs that the collaborative shall file a report within nine months of this order, identifying the economic and achievable potential for energy efficient improvements and program designs to implement further reasonable and prudent improvements in energy efficiency.

Moreover, the Commission notes that the evidence in the record of this case does not support the conclusion that low-income customers are low-usage customers. VEDO presented testimony using actual census data for its service area, demonstrating that low-income customers in VEDO's service area consume, on average, more natural gas annually than all but the highest income residential customers in its service area (Co. Ex. 8a at 12-14). Further, it is undisputed that PIPP customers use more natural gas than the average of all residential customers (Co. Ex. 8a at 17). Staff witness Puican recommended the use of PIPP customers as the best available proxy for low-income customers (Staff Ex. 3 at 7; Tr. VI at 35). Although OCC's witness Coulton testified that his analysis indicated that low-income customers were also low-usage customers, Mr. Coulton based his analysis upon monthly surveys conducted by the Census Bureau, using data which the Census Bureau cautioned may be unreliable (Tr. V at 56-63; Co. Ex. 8a at 11); thus, Mr. Coulton's testimony regarding whether low-income customers are also low-usage customers is of little probative value in this proceeding. We find that the record demonstrates that low-income customers, on average, would actually enjoy lower bills under the levelized rate design.

We also find that the levelized rate design promotes the regulatory principles of providing a more equitable cost allocation among customers, regardless of usage. It fairly apportions the fixed costs of service among all customers so that everyone pays their fair share. Customers who use more energy for reasons beyond their control, such as

abnormal weather, a large number of persons sharing a household, or older housing stock, will no longer have to pay their own fair share plus part of someone else's fair share of the costs.

Nonetheless, as we noted in *Duke* and *DEO*, we recognize that, with this change in rate design, as with any change, there will be some customers who will be better off and some customers who will be worse off, in comparison to the existing rate design. The levelized rate design will impact low-usage customers more than high-usage customers, since they have not been paying the entirety of their fixed costs under the existing rate design. High-usage customers, who have been paying more than their share of the fixed costs, will actually experience a reduction in their gas bills.

The Commission is concerned, however, with the impact that the change in rate structure will have on some VEDO customers who are low-income, low-usage customers. The Commission believes that some relief is warranted for this class of customers. In previous cases, we approved a pilot program available to a specified number of eligible customers, in order to provide incentives for low-income customers to conserve and to avoid penalizing low-income customers who wish to stay off of programs such as PIPP. We have emphasized that the implementation of the pilot program was important to our decisions to adopt a levelized rate design in that case. Therefore, the Commission finds that VEDO should likewise implement a one-year, low-income, pilot program aimed at helping low-income, low-usage customers pay their bills.

As in the prior cases, the customers in the low-income, pilot program shall be non-PIPP, low-usage customers, verified at or below 175 percent of the poverty level. VEDO's program should provide a four-dollar, monthly discount to cushion much of the impact on qualifying customers. This pilot program should be made available for one year to the first 5,000 eligible customers. VEDO, in consultation with staff and the parties, shall establish eligibility qualifications for this program by first determining and setting the maximum low-usage volume projected to result in the inclusion of 5,000 low-income customers who are determined to be at or below 175 percent of the poverty level. The Commission expects that VEDO will promote this program such that, to the fullest extent practicable, the program is fully enrolled with 5,000 customers. Following the end of the pilot program, the Commission will evaluate the program for its effectiveness in addressing our concerns relative to the impact on low-usage, low-income customers.

Having decided that the Commission will approve a levelized rate design rather than an SRR, we will address whether to adopt a partial SFV, which includes a volumetric component, or to move directly to a full levelized rate design. According to the evidence in the record, a residential customer charge of \$18.37 would produce the full residential revenue requirement stipulated to by the Signatory Parties (Tr. VIII at 11-12). The fixed rate of \$18.37 would allow the Commission to completely eliminate the volumetric charge

for distribution service, which would eliminate the collection of any fixed distribution costs through the volumetric rate. However, as we have noted in other recent decisions, the Commission is sensitive to the impact of any rate increase on customers, especially during these tough economic times. We note that we have previously approved a sales decoupling mechanism for VEDO in Case No. 05-1444-GA-UNC, which represented an initial step in transitioning VEDO away from traditional rate design and included efforts toward conservation. We believe that a gradual move to the SFV rate design will continue our effort to help to correct the traditional design inequities while mitigating the impact of the new rates on customers by maintaining a volumetric component to the rates for the first year.

We recognize that VEDO proposed that the residential customer charge be set at \$10.00 per month during the summer months of the first year and at \$16.75 per month during the winter months of the first year. (Tr. III at 11.) We do not believe that a seasonal difference is appropriate, especially in light of the increased rates that such an approach would cause during the time of year when bills are otherwise the highest. However, we are willing to use the average of those two figures as the customer charge during the first year following this issuance of this opinion and order. Therefore, the customer charge during the first year will be set at \$13.37 per month, with a volumetric rate to allow VEDO to collect the authorized revenue requirement. After the first year, the customer charge will adjust to the full \$18.37 per month, with no volumetric rate.

V. Tariffs

As part of its investigation in this matter, Staff reviewed the various rates, charges, and provisions governing terms and conditions of service set out in VEDO's proposed tariffs. Further, revised tariffs which comply with the Stipulation were submitted by the Signatory Parties (Joint Ex. 1, Stipulation Exhibit 2). Upon review, the Commission finds VEDO's proposed tariffs reasonable, except for the phase-in of the SFV rate design that is required by this opinion and order. Therefore, VEDO shall file proposed tariff pages in compliance with this opinion and order, for Commission approval, reflecting rates that will result in collection of the authorized revenue requirement.

VI. Other Issues

OCC and OPAE argue that VEDO failed to provide adequate notice to customers of the proposed second-stage SFV rates, as required by Sections 4909.18(B), 4909.19, and 4909.43(B), Revised Code. Specifically, OCC and OPAE allege that VEDO's notice of intent (PFN) filed under Section 4909.43, Revised Code, is inadequate because VEDO's second stage rates for certain customers do not match the rates in VEDO's application. OCC and OPAE also claim that VEDO's published notice is defective because it did not include the second-stage rates for certain residential customers.

VEDO argues that OCC and OPAE have not demonstrated that the PFN lacks substantial compliance with the requirements of Section 4904.43, Revised Code. VEDO further claims that OCC and OPAE lack standing to raise issues regarding the sufficiency of the PFN, which is required by statute to be served upon municipalities in the utility's service area; VEDO believes that only these municipalities would have standing to raise claims regarding the PFN. Finally, VEDO argues that OCC and OPAE have not demonstrated any harm to residential customers resulting from the differences rates in the published notice and VEDO's application and that OCC and OPAE have cited to no authority that these differences warrant a new notice and new hearing.

Staff also claims that OCC and OPAE lack standing to raise claims regarding the adequacy of the notice contained in the PFN. Staff further argues that VEDO substantially complied with the letter and spirit of Section 4909.43, Revised Code, in its PFN; Staff claims that the differences in the volumetric rates in the PFN and the volumetric rates in the VEDO's application amount to \$0.21 per year for a residential customer using 1000 Ccf per year and that these differences are so negligible as to be meaningless from a customer's perspective.

The Commission notes that the Supreme Court has held that the published notice must include the "substance" of the application which the Court defined as "the essential nature or quality" of the proposal. *Committee against MRT v. Pub. Util. Comm.* (1977), 32 Ohio St. 2d 231, 233. The Court later expanded upon its decision in *MRT*, stating that:

The notice requirement of the statute as discussed by this court in *MRT* . . . is not an unreasonable one. It requires only that the notice state the reasonable substance of the proposal so that consumers can determine whether to inquire further as to the proposal or intervene in the rate case.

Ohio Association of Realtors v. Pub. Util. Comm. (1979), 60 Ohio St. 2d 172, 176.

The notices at issue in this proceeding stated the reasonable substance of VEDO's proposal and provided sufficient information for consumers to determine whether to inquire further into the proposal or intervene in the case. As the Staff points out, the differences in the PFN and the application are negligible. Further, the published notice provided sufficient information to consumers to understand that VEDO had proposed a new rate design along with its proposed increase in rates so that consumers could determine whether to inquire further into the case or to intervene. Accordingly, the Commission finds that the notices at issue substantially comply with the applicable statutes.

FINDINGS OF FACT:

- (1) On November 20, 2007, VEDO filed applications for an increase in gas distribution rates and for approval of an alternative rate plan.
- (2) A technical conference regarding VEDO's applications was held on February 5, 2008.
- (3) On May 23, 2008, VEDO filed an application for continued accounting authority to defer differences between actual base revenues and commission approved base revenues, as previously granted by the Commission.
- (4) A written report of the staff's investigation was filed on June 16, 2008. Objections to the Staff Report were timely filed by VEDO, OCC, Honda, OPAE, and OEC. Motions to intervene were filed by OCC, Honda, OPAE, OEC, IGS, and Stand.
- (5) Intervention was granted to OCC, Honda, OPAE, OEC, IGS, and Stand by the attorney examiner on August 1, 2008.
- (6) On July 18, 2008, a prehearing conference was held.
- (7) Local public hearings were held on September 3, 2008, in Sidney, Ohio; on September 4, 2008, in Dayton, Ohio; and on September 8, 2008, in Washington Court House, Ohio.
- (8) Notice of the local public hearings was published in accordance with Section 4903.083, Revised Code.
- (9) The evidentiary hearing was commenced on August 19, 2008 and continued on August 20 through August 25, 2008, August 27, 2008, August 28, 2008, September 2, 2008, September 9, 2008, and September 15, 2008.
- (10) On September 8, 2008, a Stipulation was filed on behalf of VEDO, OCC, OPAE, and Staff.
- (11) The Signatory Parties stipulated to a net operating income of \$11,270,763 for the test year ending May 31, 2008.
- (12) Income of \$11,270,763 represents a 4.80 percent rate of return on the stipulated rate base of \$234,839,282.

- (13) The stipulated gross annual revenue to which VEDO is entitled for purposes of this proceeding is \$456,791,425. The Signatory Parties stipulated to a gross revenue increase of \$14,779,153 which should produce a net operating income of \$20,877,212. A net operating income of \$20,877,212 represents a rate of return of 8.89 percent on a rate base of \$234,839,282.
- (14) A rate of return of 8.89 percent is fair and reasonable under the circumstances presented by this case and is sufficient to provide the Company with just and reasonable compensation and return on the value of its property used and useful in furnishing the service described in the application.
- (15) The Stipulation was the product of bargaining among knowledgeable parties, benefits ratepayers and the public interest, and does not violate any important regulatory principles or practices. The Stipulation is reasonable and should be adopted.

CONCLUSIONS OF LAW:

- (1) VEDO's applications were filed pursuant to, and this Commission has jurisdiction over the applications under, the provisions of Sections 4909.17, 4909.18, 4909.19, 4929.05, and 4929.11, Revised Code. The application complies with the requirements of those statutes.
- (2) A staff investigation was conducted and a report duly filed and mailed, and public hearings held herein, the written notice of which complied with the requirements of Sections 4909.19 and 4903.083, Revised Code.
- (3) The ultimate issue for the Commission's consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of the stipulation, the Commission has used the following criteria:

Is the settlement a product of serious bargaining among capable, knowledgeable parties?

Does the settlement, as a package, benefit ratepayers and the public interest?

Does the settlement package violate any important regulatory principle or practice?

- (4) A rate of return of 4.80 percent does not provide VEDO with reasonable compensation and return on its property used and useful in the rendition of natural gas services.
- (5) It is reasonable and in the public interest to transition, over a phase-in period, to an SFV rate design, as set forth in this opinion and order.

ORDER:

It is, therefore,

ORDERED, That the Stipulation filed on September 8, 2008, be approved. It is, further,

ORDERED, That VEDO comply with all of the requirements and obligations stated in the Stipulation. It is, further,

ORDERED, That the application of VEDO for authority to increase its rates and charges for service be granted to the extent provided in this opinion and order. It is, further,

ORDERED, that VEDO implement a one-year, low-income, pilot program consistent with this opinion and order. It is, further,

ORDERED, That VEDO shall file, for Commission approval, proposed tariffs consistent with this opinion and order. It is, further,

ORDERED, That a copy of this opinion and order be served on all parties of record.

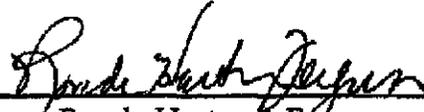
THE PUBLIC UTILITIES COMMISSION OF OHIO



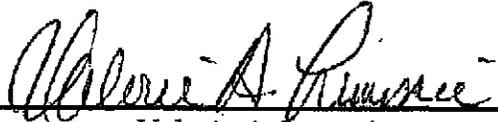
Alan R. Schriber, Chairman



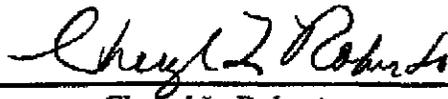
Paul A. Centolella



Ronda Hartman Fergus



Valerie A. Lemmie



Cheryl L. Roberto

GAP/vrm

Entered in the Journal

JAN 07 2008



Renee J. Jenkins
Secretary

EXHIBIT B

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Vectren)
Energy Delivery of Ohio, Inc. for Authority)
To Amend its Filed Tariffs to Increase the) Case No. 07-1080-GA-AIR
Rates and Charges for Gas Services and)
Related Matters.)

ENTRY

The Commission finds:

- (1) This Commission's Opinion and Order, journalized January 7, 2009, authorized Vectren Energy Delivery of Ohio, Inc. (Applicant) to file for Commission review and approval four complete copies of tariffs conforming to all Staff recommendations and consistent with that Opinion and Order, and the proposed customer notice of the increase granted.
- (2) In accordance with the Opinion and Order, Applicant has submitted for Commission review and approval four complete copies of its new tariffs and a proposed customer notice of the authorized increase.
- (3) The Commission has reviewed the Applicant's proposed tariffs and finds that the Applicant's proposed tariffs would produce gross annual revenues not in excess of that authorized in the Commission's Opinion and Order.
- (4) Applicant's proposed tariffs also include all recommendations made in the Staff Report and are, therefore, consistent with the Opinion and Order.
- (5) Applicant's proposed customer notice of increase in rates has been reviewed and approved by Staff.

It is, therefore,

ORDERED, That Vectren's proposed tariffs be approved. It is, further,

ORDERED, That Applicant be authorized to file in final form four complete, printed copies of tariffs consistent with the findings of this Entry. Applicant shall

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file one copy in its TRF docket (or may make such filing electronically as directed in Case No. 06-900-AU-WVR), and one copy in this case docket. The remaining two copies shall be designated for distribution to the Rates and Tariffs, Energy and Water Division of the Commission's Utilities Department. It is, further,

ORDERED, That the effective date of the new tariffs shall be a date not earlier than the date on which four complete, printed copies of final tariffs are filed with the Commission. The new tariffs shall be effective for bills rendered on or after such effective date. It is, further,

ORDERED, That nothing in this entry shall be deemed to be binding upon this Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any rates, charge, rule or regulation. It is, further,

ORDERED, That a copy of this Entry be served upon the Applicant and other parties of record in this case.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

WLG:sm

Entered in the Journal

FEB 04 2009

Renee J. Jenkins
Secretary

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers')	Case No. 09-1547
Counsel,)	
)	
Appellant,)	
)	Appeal from the Public
v.)	Utilities Commission of Ohio
)	Case Nos. 07-1080-GA-AIR
The Public Utilities Commission)	and 07-1081-GA-ALT
of Ohio,)	
)	
Appellee.)	

**APPENDIX OF
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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2505.12 No supersedeas bond required for certain appeals.

An appellant is not required to give a supersedeas bond in connection with any of the following:

(A) An appeal by any of the following:

(1) An executor, administrator, guardian, receiver, trustee, or trustee in bankruptcy who is acting in that person's trust capacity and who has given bond in this state, with surety according to law;

(2) The state or any political subdivision of the state;

(3) Any public officer of the state or of any of its political subdivisions who is suing or is sued solely in the public officer's representative capacity as that officer.

(B) An administrative-related appeal of a final order that is not for the payment of money.

Effective Date: 07-11-2001

000001

4903.13 Reversal of final order - notice of appeal.

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

Effective Date: 10-01-1953

000002

4903.16 Stay of execution.

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

Effective Date: 10-01-1953

000003

4903.17 Order in case of stay.

The supreme court, in case it stays or suspends the order or decision of the public utilities commission in any matter affecting rates, joint rates, fares, tolls, rentals, charges, or classifications, may also by order direct the public utility or railroad affected to pay into the hands of a trustee to be appointed by the court, to be held until the final determination of the proceeding, under such conditions as the court prescribes, all sums of money collected in excess of the sums payable if the order or decision of the commission had not been stayed or suspended.

Effective Date: 10-01-1953

000004

4903.18 Order to keep excess accounts pending review.

In case the supreme court stays or suspends any order or decision of the public utilities commission lowering any rate, joint rate, fare, toll, rental, charge, or classification, the commission, upon the execution and approval of the suspending bond required by section 4903.16 of the Revised Code, may require the public utility or railroad affected, under penalty of the immediate enforcement of the order or decision of the commission, pending review, to keep such accounts, verified by oath, as are, in the judgment of the commission, sufficient to show the amounts being charged or received by such public utility or railroad in excess of the charges allowed by the order or decision of the commission, together with the names and addresses of the corporations or persons to whom overcharges will be refundable in case the charges made by the public utility or railroad pending review are not sustained by the supreme court.

Effective Date: 10-01-1953

000005

4903.19 Disposition of moneys charged in excess.

Upon the final decision by the supreme court upon an appeal from an order or decision of the public utilities commission, all moneys which the public utility or railroad has collected pending the appeal, in excess of those authorized by such final decision, shall be promptly paid to the corporations or persons entitled to them, in such manner and through such methods of distribution as are prescribed by the court. If any such moneys are not claimed by the corporations or persons entitled to them within one year from the final decision of the supreme court, the trustees appointed by the court shall give notice to such corporations or persons by publication, once a week for two consecutive weeks, in a newspaper of general circulation published in Columbus, and in such other newspapers as are designated by such trustee, said notice to state the names of the corporations or persons entitled to such moneys and the amount due each corporation or person. All moneys not claimed within three months after the publication of said notice shall be paid by the public utility or railroad, under the direction of such trustee, into the state treasury for the benefit of the general fund. The court may make such order with respect to the compensation of the trustee as it deems proper.

Effective Date: 10-07-1977

000006

4905.70 Energy conservation programs.

The public utilities commission shall initiate programs that will promote and encourage conservation of energy and a reduction in the growth rate of energy consumption, promote economic efficiencies, and take into account long-run incremental costs. Notwithstanding sections 4905.31, 4905.33, 4905.35, and 4909.151 of the Revised Code, the commission shall examine and issue written findings on the declining block rate structure, lifeline rates, long-run incremental pricing, peak load and off-peak pricing, time of day and seasonal pricing, interruptible load pricing, and single rate pricing where rates do not vary because of classification of customers or amount of usage. The commission, by a rule adopted no later than October 1, 1977, and effective and applicable no later than November 1, 1977, shall require each electric light company to offer to such of their residential customers whose residences are primarily heated by electricity the option of their usage being metered by a demand or load meter. Under the rule, a customer who selects such option may be required by the company, where no such meter is already installed, to pay for such meter and its installation. The rule shall require each company to bill such of its customers who select such option for those kilowatt hours in excess of a prescribed number of kilowatt hours per kilowatt of billing demand, at a rate per kilowatt hour that reflects the lower cost of providing service during off-peak periods.

Effective Date: 01-01-2001

000007

4909.18 Application to establish or change rate.

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission. Except for actions under section 4909.16 of the Revised Code, no public utility may issue the notice of intent to file an application pursuant to division (B) of section 4909.43 of the Revised Code to increase any existing rate, joint rate, toll, classification, charge, or rental, until a final order under this section has been issued by the commission on any pending prior application to increase the same rate, joint rate, toll, classification, charge, or rental or until two hundred seventy-five days after filing such application, whichever is sooner. Such application shall be verified by the president or a vice-president and the secretary or treasurer of the applicant. Such application shall contain a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based. If such application proposes a new service or the use of new equipment, or proposes the establishment or amendment of a regulation, the application shall fully describe the new service or equipment, or the regulation proposed to be established or amended, and shall explain how the proposed service or equipment differs from services or equipment presently offered or in use, or how the regulation proposed to be established or amended differs from regulations presently in effect. The application shall provide such additional information as the commission may require in its discretion. If the commission determines that such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission may permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect. If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing by sending written notice of the date set for the hearing to the public utility and publishing notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application. At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility. After such hearing, the commission shall, where practicable, issue an appropriate order within six months from the date the application was filed.

If the commission determines that said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:

- (A) A report of its property used and useful in rendering the service referred to in such application, as provided in section 4909.05 of the Revised Code;
- (B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;
- (C) A statement of the income and expense anticipated under the application filed;
- (D) A statement of financial condition summarizing assets, liabilities, and net worth;
- (E) A proposed notice for newspaper publication fully disclosing the substance of the application. The notice shall prominently state that any person, firm, corporation, or association may file, pursuant to

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section 4909.19 of the Revised Code, an objection to such increase which may allege that such application contains proposals that are unjust and discriminatory or unreasonable. The notice shall further include the average percentage increase in rate that a representative industrial, commercial, and residential customer will bear should the increase be granted in full;

(F) Such other information as the commission may require in its discretion.

Effective Date: 01-11-1983

000009

4909.19 Publication - investigation.

Upon the filing of any application for increase provided for by section 4909.18 of the Revised Code the public utility shall forthwith publish the substance and prayer of such application, in a form approved by the public utilities commission, once a week for three consecutive weeks in a newspaper published and in general circulation throughout the territory in which such public utility operates and affected by the matters referred to in said application, and the commission shall at once cause an investigation to be made of the facts set forth in said application and the exhibits attached thereto, and of the matters connected therewith. Within a reasonable time as determined by the commission after the filing of such application, a written report shall be made and filed with the commission, a copy of which shall be sent by certified mail to the applicant, the mayor of any municipal corporation affected by the application, and to such other persons as the commission deems interested. If no objection to such report is made by any party interested within thirty days after such filing and the mailing of copies thereof, the commission shall fix a date within ten days for the final hearing upon said application, giving notice thereof to all parties interested. At such hearing the commission shall consider the matters set forth in said application and make such order respecting the prayer thereof as to it seems just and reasonable.

If objections are filed with the commission, the commission shall cause a pre-hearing conference to be held between all parties, intervenors, and the commission staff in all cases involving more than one hundred thousand customers.

If objections are filed with the commission within thirty days after the filing of such report, the application shall be promptly set down for hearing of testimony before the commission or be forthwith referred to an attorney examiner designated by the commission to take all the testimony with respect to the application and objections which may be offered by any interested party. The commission shall also fix the time and place to take testimony giving ten days' written notice of such time and place to all parties. The taking of testimony shall commence on the date fixed in said notice and shall continue from day to day until completed. The attorney examiner may, upon good cause shown, grant continuances for not more than three days, excluding Saturdays, Sundays, and holidays. The commission may grant continuances for a longer period than three days upon its order for good cause shown. At any hearing involving rates or charges sought to be increased, the burden of proof to show that the increased rates or charges are just and reasonable shall be on the public utility.

When the taking of testimony is completed, a full and complete record of such testimony noting all objections made and exceptions taken by any party or counsel, shall be made, signed by the attorney examiner, and filed with the commission. Prior to the formal consideration of the application by the commission and the rendition of any order respecting the prayer of the application, a quorum of the commission shall consider the recommended opinion and order of the attorney examiner, in an open, formal, public proceeding in which an overview and explanation is presented orally. Thereafter, the commission shall make such order respecting the prayer of such application as seems just and reasonable to it.

In all proceedings before the commission in which the taking of testimony is required, except when heard by the commission, attorney examiners shall be assigned by the commission to take such testimony and fix the time and place therefor, and such testimony shall be taken in the manner prescribed in this section. All testimony shall be under oath or affirmation and taken down and transcribed by a reporter and made a part of the record in the case. The commission may hear the

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testimony or any part thereof in any case without having the same referred to an attorney examiner and may take additional testimony. Testimony shall be taken and a record made in accordance with such general rules as the commission prescribes and subject to such special instructions in any proceedings as it, by order, directs.

Effective Date: 01-11-1983

4911.02 Consumers' counsel - powers and duties.

(A) The consumers' counsel shall be appointed by the consumers' counsel governing board, and shall hold office at the pleasure of the board.

(B)(1) The counsel may sue or be sued and has the powers and duties granted him under this chapter, and all necessary powers to carry out the purposes of this chapter.

(2) Without limitation because of enumeration, the counsel:

(a) Shall have all the rights and powers of any party in interest appearing before the public utilities commission regarding examination and cross-examination of witnesses, presentation of evidence, and other matters;

(b) May take appropriate action with respect to residential consumer complaints concerning quality of service, service charges, and the operation of the public utilities commission;

(c) May institute, intervene in, or otherwise participate in proceedings in both state and federal courts and administrative agencies on behalf of the residential consumers concerning review of decisions rendered by, or failure to act by, the public utilities commission;

(d) May conduct long range studies concerning various topics relevant to the rates charged to residential consumers.

Effective Date: 09-01-1976

4911.06 Consumers' counsel considered state officer.

The consumers' counsel shall be considered a state officer for the purpose of section 24 of Article II, Ohio constitution.

Effective Date: 09-01-1976

000013

4911.15 Counsel may represent residential consumer or municipal corporation.

The consumers' counsel, at the request of one or more residential consumers residing in, or municipal corporations located in, an area served by a public utility or whenever in his opinion the public interest is served, may represent those consumers or corporations whenever an application is made to the public utilities commission by any public utility desiring to establish, modify, amend, change, increase, or reduce any rate, joint rate, toll, fare, classification, charge, or rental.

The consumers' counsel may appear before the public utilities commission as a representative of the residential consumers of any public utility when a complaint has been filed with the commission that a rate, joint rate, fare, toll, charge, classification, or rental for commodities or services rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted by the utility is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of the law.

Nothing in Chapter 4911. of the Revised Code shall be construed to restrict or limit in any manner the right of a municipal corporation to represent the residential consumers of such municipal corporation in all proceedings before the public utilities commission, and in both state and federal courts and administrative agencies on behalf of such residential consumers concerning review of decisions rendered by, or failure to act by, the public utilities commission.

Effective Date: 06-12-1980

000014

4929.02 Policy of state as to natural gas services and goods.

(A) It is the policy of this state to, throughout this state:

(1) Promote the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods;

(2) Promote the availability of unbundled and comparable natural gas services and goods that provide wholesale and retail consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(3) Promote diversity of natural gas supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers;

(4) Encourage innovation and market access for cost-effective supply- and demand-side natural gas services and goods;

(5) Encourage cost-effective and efficient access to information regarding the operation of the distribution systems of natural gas companies in order to promote effective customer choice of natural gas services and goods;

(6) Recognize the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory treatment;

(7) Promote an expeditious transition to the provision of natural gas services and goods in a manner that achieves effective competition and transactions between willing buyers and willing sellers to reduce or eliminate the need for regulation of natural gas services and goods under Chapters 4905. and 4909. of the Revised Code;

(8) Promote effective competition in the provision of natural gas services and goods by avoiding subsidies flowing to or from regulated natural gas services and goods;

(9) Ensure that the risks and rewards of a natural gas company's offering of nonjurisdictional and exempt services and goods do not affect the rates, prices, terms, or conditions of nonexempt, regulated services and goods of a natural gas company and do not affect the financial capability of a natural gas company to comply with the policy of this state specified in this section;

(10) Facilitate the state's competitiveness in the global economy;

(11) Facilitate additional choices for the supply of natural gas for residential consumers, including aggregation;

(12) Promote an alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation.

(B) The public utilities commission and the office of the consumers' counsel shall follow the policy specified in this section in exercising their respective authorities relative to sections 4929.03 to 4929.30 of the Revised Code.

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(C) Nothing in Chapter 4929, of the Revised Code shall be construed to alter the public utilities commission's construction or application of division (A)(6) of section 4905.03 of the Revised Code.

Effective Date: 06-26-2001; 2008 SB221 07-31-2008

AN ACT

Changing the name of the Railroad Commission of Ohio, to that of the Public Service Commission of Ohio, defining the powers and duties of the latter commission with respect to public utilities, and to amend sections 501, 502 and 606 of the General Code.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 501, 502 and 606 of the General Code be amended to read as follows:

Sec. 501. The term "railroad" as used in this chapter shall include all corporations, companies, individuals, associations of individuals, their lessees, trustees, or receiver appointed by a court, which owns, operates, manages or controls a railroad or part thereof as a common carrier in this state, or which owns, operates, manages or controls any cars or other equipment used thereon, or which owns, operates, manages or controls any bridges, terminals, union depots, side tracks, docks, wharves, or storage elevators used in connection therewith, whether owned by such railroad or otherwise. Such term "railroad" shall mean and embrace express companies, water transportation companies and interurban railroad companies, and all duties required of and penalties imposed upon a railroad or an officer or agent thereof insofar as they are applicable, shall be required of and imposed upon express companies, water transportation companies and interurban railroad companies, their officers and agents. The commission shall have the power of supervision and control of express companies, water transportation companies and interurban railroad companies to the same extent as railroads.

"Railroad" defined.

Other companies.

Application of act.

Sec. 502. This chapter shall apply to the transportation of passengers and property between points within this state, to the receiving, switching, delivering, storing and handling of such property; and to all charges connected therewith, including icing charges and mileage charges, to all railroad companies, sleeping car companies, equipment companies, express companies, car companies, freight and freight line companies, to all associations of persons, whether incorporated or otherwise, which do business as common carriers, upon or over a line of railroad within this state, and to a common carrier engaged in the transportation of passengers or property wholly by rail or partly by rail and partly by water or wholly by water. In addition thereto the provisions of this act shall apply to the regulation of any and all other duties, services, practices and charges, of the railroad company, incident to the shipping and receiving of freight, which are proper subjects of regulation, excepting only, that they shall not apply to the regulation of commerce with foreign nations, and among the several states, and with the Indian tribes.

More than five hundred days in jail for not less than one year, or both, in the case of any person who shall wilfully and knowingly make any false statement or declaration under oath relating to the crime of perjury, and punished as provided in section 2901.02 of the General Code.

membership for, or in any other manner assist in any business in this state, or in any manner assist in any society not authorized as herein defined in this section, and upon conviction thereof shall be fined not less than fifty nor more than one hundred dollars upon conviction.

agent or employe thereof with, or violating any of the provisions of this section, shall be fined not less than fifty nor more than one hundred dollars upon conviction.

acts of acts inconsistent with the provisions of this section.

J. VISING,
of Representatives.
L. NICHOLS,
President of the Senate.
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governor June 2, 1911, to the house wherein it being so presented, ex-said bill was presented, secretary of state June 2, 1911.

JOHN W. DEVANNEY,
Veto Clerk.

equipment in order to establish
noted and maintained in such
with such division of ex-
be required by the commis-

public utility or railroad and ev-
obey, observe, and comply with
requirement of the commission,
his act, so long as the same shall

Any public utility or railroad
under any provision of this act, or
is, omits or neglects to obey, ob-
y order or any direction or re-
sion officially promulgated shall
not to exceed one thousand dol-
y omission or neglect and each
shall be decreed and held to be

e being an officer, agent or em-
y, of a public utility or railroad
ugly violates any provisions of
omits or neglects to obey, ob-
lawful order or direction of the
ect to any public utility or rail-
s than one hundred dollars nor
dollars, or imprisoned not more
each day's continuance of such
t shall constitute a separate of-

to recover penalties and fur-
his act, shall be prosecuted in
be brought in the court of
which the public utility or
Such action shall be commenced
rney general, when directed su-
loneys recovered by such action
ste treasury to the credit of the

the commission shall be of the
dility or railroad has failed.
y any order made with respect
or neglect so to do, or is per-
o pervert anything contrary to,
order of the commission, duly
ions of this act, the attorney
of the commission, shall con-
action, actions, or proceedings
on in the name of the state, as
omission, against such public
the violation complained of
of, and in such case the court
y be proper in the premises.
blic utility or railroad does, or

causes to be done, any act, matter, or thing prohibited by
this act, or declared to be unlawful, or shall omit to do any
act, matter or thing required by this act, or by order of
the commission, such public utility or railroad shall be
liable to the person, firm or corporation injured thereby in
treble the amount of damages sustained in consequence of
such violation, failure or omission; provided, that any re-
covery under this section shall in no manner affect a re-
covery by the state for any penalty provided for in this
act.

Treble damages
on violations.

SECTION 72. A public utility or railroad or other party
in interest, dissatisfied with an order of the commission
fixing or substituting or confirming any fare, toll, price,
rate, charge, rental, schedule or classification, or any order
fixing or substituting or confirming any regulation, prac-
tice, act or service, or any other order, finding, determina-
tion, direction or requirement of the commission, may com-
mence an action in the court of common pleas of Franklin
county or of the county in which is located the principal
office of the public utility or railroad within sixty days
after such order is made, against the commission as de-
fendant, to vacate and set aside such order on the ground
that the fare, toll, price, rate, charge, rental, schedule or
classification fixed in such order, is unlawful or unreason-
able, or that the regulation, practice, act or service, fixed
in such order is unlawful or unreasonable; or that the
order, finding, determination, direction or requirement of
the commission is unlawful or unreasonable; in which ac-
tion summons may be issued to any county or counties in
this state and there served upon the adverse parties. Such
action shall proceed as provided in sections 544, 545, 546,
547, 548, 549, 550, 551, 552 of the General Code, which
sections shall apply to public utilities with the same force
and effect as to railroads.

Action to va-
cate order, etc.

SECTION 73. Upon the commencement of any such ac-
tion, the operation of the order, finding, determination, di-
rection or requirement complained of shall not be sus-
pended until the determination of said action, unless the
court or a judge thereof, after notice of and hearing, shall
otherwise order and the court or judge thereof may, after
hearing, fix the terms and conditions for the suspension of
said order, finding, determination, direction or requirement
or any part thereof.

Suspension of
order, when.

Provided, however, that the commencement of such
action to vacate and set aside any order of the commis-
sion with respect to any fare, toll, price, rate, charge, or
rental, shall vacate and suspend the order of the commis-
sion sought to be vacated, if such public utility or railroad
shall elect to charge the fare, toll, price, rate, charge, or
rental in force and effect immediately prior to the entering
of such order of the commission, and shall give an under-
taking in such amount as the court shall determine. The
undertaking shall be filed with the court and shall be pay-

The bond

able to the state of Ohio for the use and benefit of the users affected by the order of the commission. The condition of the undertaking shall be that the public utility or railroad shall refund to each of such users, public or private, the amount collected by it in excess of the amount which shall finally be determined it was authorized to collect from such users. The court shall make all necessary orders in respect to the form of such undertaking and the manner of making such refunders.

Section 614-71.
Service of order.

SECTION 74. Every order provided for in this act, shall be served upon every person or corporation to be affected thereby, either by personal delivery or a certified copy thereof, or by mailing a certified copy thereof, in a sealed package with postage prepaid, to the person to be affected thereby, or in the case of a corporation, to any officer or agent thereof, upon whom a summons may be served. It shall be the duty of every person and corporation to notify the commission forthwith, in writing, of the receipt of the certified copy of every order so served, and in the case of a corporation such notification must be signed and acknowledged by a person or officer duly authorized by the corporation to admit such service. Within a time specified in the order of the commission every person or corporation upon whom it is served must if so required in the order notify the commission in like manner whether the terms of the order are accepted and will be obeyed.

Section 614-73.

Free service or
reduced rates
valid, when.

SECTION 75. Nothing in this act contained shall prevent any public utility or railroad from granting the whole or any part of its property for any public purpose, or granting reduced rate or free service of any kind to the United States government, the state government or any political division or subdivision thereof, or for charitable purposes or for fairs or expositions or to any officer or employe of such public utility or railroad or his family and all contracts and agreements made or entered into by such public utility or railroad for such use, reduced rates, or free service shall be valid and enforceable at law.

Section 614-75.

Limitation.

SECTION 76. No franchise, permit, license or right to own, operate, manage or control any public utility, herein defined as an electric light company, gas company, water works company or heating and cooling company, shall be hereafter granted or transferred to any corporation not duly incorporated under the laws of Ohio.

Section 614-74.

SECTION 77. Companies formed to acquire property or to transact business which would be subjected to the provisions of this act, and companies owning or possessing franchises for any of the purposes contemplated in this act, shall be deemed and held to be subject to the provisions of this act, although no property may have been acquired, business transacted or franchises exercised.

Section 614-75.

SECTION 78. The act, omission or failure of any officer, agent or other person, acting for or employed by a public utility or railroad, while acting within the scope

of his employment, shall be deemed an omission or failure of the public utility or railroad.

Section 614-72.

SECTION 79. The commission shall have a seal which shall be one inch and one-eighth of an inch in diameter, with such design as the commission may determine, engraved thereon, and surrounded by the words "Public Service Commission of Ohio." The seals and orders shall be authenticated and attested by the commission and shall take judicial notice.

Section 614-76.

SECTION 80. The commission shall be authorized for furnishing any copy of any order or writing made, taken or filed in any court, except such transcripts and copies required to be filed in any court or proceeding, whether under seal and order, and the same fees now charged by the commission for such services itemized shall be paid into the treasury of the commission on the first day of each month. Upon the receipt of such fees and payment of the proper fee the commission shall furnish certified copies of any order made by it, and evidence in any court of the fact of such order, copies of schedules and classifications, rates, tolls, prices, rentals, regulations and charges, and of all contracts and agreements made between public utilities and the commission as herein provided, and tables and figures contained in the records of such companies made to the commission under the provisions of this act, and records in the custody of the commission received as prima facie evidence for the purpose of investigation by the commission and in all judicial proceedings, and extracts from any of such schedules, orders, affidavits, contracts, agreements, arrangements, and public records as aforesaid, certified under the seal of such commission, shall be deemed to have the same force and effect as the original order made by such commission, and such commission, shall be furnished with a copy of such application.

Section 614-77.

SECTION 81. The commission shall be authorized upon by any officer, board or commission hereafter created in the state of Ohio, to furnish any data or information to the commission and shall be authorized to call any officer, board or commission in any court or its office, and all officers, boards or commissions existing or hereafter created in any division thereof, shall furnish upon request, any data or information

The sectional numbers on the margin hereof are designated as provided by law.
 TIMOTHY S. HOGAN,
 Attorney General.

shall not take effect until the first day of March, 1914. This act shall in all other respects take effect and be in force from and after the second Monday of October, 1913.

C. L. SWAIN,
Speaker of the House of Representatives.
 HUGH L. NICHOLS,
President of the Senate.

Passed April 18th, 1913.
 Approved May 6th, 1913.

JAMES M. COX,
Governor.

Filed in the office of the Secretary of State May 10th, 1913.
 314 G.

[House Bill No. 682.]

AN ACT

To create the public utilities commission of Ohio, to prescribe its organization, its powers and its duties, and to repeal sections 487 to 499 inclusive, sections 548 to 551 inclusive, sections 614, 614-24, 614-25, 614-26, 614-60, 614-70, 614-80, 614-81 and 614-82 of the General Code.

Be it enacted by the General Assembly of the State of Ohio:

Section 487.
 The public utilities commission of Ohio; appointment, term, vacancies.

SECTION 1. There shall be and there is hereby created a public utilities commission of Ohio and by that name the commission may sue and be sued. The public utilities commission shall consist of three members, who shall be appointed by the governor with the advice and consent of the senate, and shall possess the powers and duties herein specified as well as all powers necessary and proper to carry out the purposes of this chapter. Immediately after this act shall take effect, the governor shall, with the advice and consent of the senate, appoint a member whose term shall expire on the first day of February, 1915; another whose term shall expire on the first day of February, 1917, and another whose term shall expire on the first day of February, 1919; and thereafter each member shall be appointed and confirmed for a term of six years. Vacancies shall be filled in the same manner for unexpired terms. One of such commissioners, to be designated by the governor, shall, during the term of the appointing governor, be the chairman of the commission. Not more than two of said commissioners shall belong to or be affiliated with the same political party.

Section 488.
 Removal; filing record of proceedings and decision.

SECTION 2. The governor may remove any commissioner for inefficiency, neglect of duty, or malfeasance in office, giving to him a copy of the charges against him and an opportunity to be publicly heard, in person or by counsel, in his own defense, upon not less than ten days' notice. If such commissioner shall be removed the governor shall file in the office of the secretary of state a complete statement of all charges made against such commissioner, and

his findings there proceedings, and
 SECTION 3. duties of his office; scribe to an oath filed in the office
 SECTION 4. commission shall of six thousand manner as other:
 SECTION 5. resident of this office, hold any United States, c division thereof, gage in any occ duties as such of the duties of his
 SECTION 6. office each meml thousand dollars sureties which sh and after such a secretary of stat company the pr funds appropriat
 SECTION 7. stitute a quorum the performance power of the co shall impair the exercise all the majority of the shall be deemed investigation, in power to undert by or before any by the commies made by a com investigation, in by the commissi and be deemed commission.
 SECTION 8. the seat of govern quarters to be between the hou throughout the The commission calendar month meet at such of be necessary for the purpose of l

For such original
 such findings
 investigations shall
 as a part of the
 supplemental find-
 ings made at the origi-

r decision has been
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 ed in the application
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 No cause of action
 the commission shall
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 o be unreasonable or
 shall in any court
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 ng made ten days or
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Any application for
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be granted without
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 ys after final submis-
 ade within said time,
 hearing that the order
 for rehearing shall
 from complying with
 any requirement of
 on theretofore made,
 postpone the enforce-
 t upon such terms as
 If, after such rehear-
 , including those aris-
 decision, the commis-
 original order or de-
 spect unjust or un-

warranted, or should be changed, the commission may abro-
 gate, change or modify the same. An order or decision
 made after such rehearing, abrogating, changing or modify-
 ing the original order or decision shall have the same force
 and effect as an original order or decision, but shall not
 affect any right or the enforcement of any right arising
 from or by virtue of the original order or decision unless
 so ordered by the commission.

Section 544.

SECTION 33. A final order made by the commission
 shall be reversed, vacated or modified by the supreme court,
 on a petition in error, if upon consideration of the record
 such court is of the opinion that such order was unlawful
 and unreasonable.

Order may be
 reversed.

Section 545.

SECTION 34. The proceeding to obtain such reversal,
 vacation or modification shall be by petition in error, filed
 in the supreme court, by any party to the proceeding before
 the commission, against the public utilities commission of
 Ohio, setting forth the errors complained of. Thereupon
 unless the same is duly waived, a summons shall issue and
 be served, as in other cases, upon the chairman of the com-
 mission, or, in the event of his absence, upon any member
 of the commission, or by leaving a copy at the office of the
 commission at the city of Columbus. The court may per-
 mit any interested party to intervene by cross-petition in
 error.

Proceedings in
 error.

Section 546.

SECTION 35. Upon service or waiver of the summons
 in error the commission shall forthwith transmit to the
 clerk of the supreme court a transcript of the journal en-
 tries, original papers or transcripts thereof and a certified
 transcript of all evidence adduced upon the hearing before
 the commission in the proceeding complained of, which shall
 be filed in said court.

Transcript.

Section 547.

SECTION 36. No proceeding to reverse, vacate or mod-
 ify a final order of the commission shall be deemed com-
 menced unless the petition therefor is filed within sixty days
 after the entry of the final order complained of upon the
 journal of the commission.

When proceeding
 commenced.

Section 548.

SECTION 37. No proceeding to reverse, vacate or mod-
 ify a final order rendered by the commission shall operate
 to stay execution thereof unless the supreme court or a
 judge thereof in vacation, on application and three days'
 notice to the commission, shall allow such stay, in which
 event the plaintiff in error shall be required to execute an
 undertaking, payable to the state of Ohio, in such a sum
 as the court may prescribe, with surety to the satisfaction
 of the clerk of the supreme court, conditioned for the
 prompt payment by the plaintiff in error of all damages
 arising from or caused by the delay in the enforcement of
 the order complained of, and for the repayment of all mon-
 eys paid by any person, firm or corporation for transporta-
 tion, transmission, produce, commodity or service in excess
 of the charges fixed by the order complained of, in the event
 such order be sustained.

Stay of execu-
 tion.

Section 549.
Jurisdiction.

SECTION 38. No court other than the supreme court shall have power to review, suspend or delay any order made by the commission, or enjoin, restrain or interfere with the commission or any member thereof in the performance of official duties. Nor shall the writ of mandamus be issued against the commission or any member thereof by any court other than the supreme court.

Section 550.
Order as to payment of money in case of stay, etc.

SECTION 39. The supreme court, in case it stays or suspends the order or decision of the commission in any matter affecting rates, joint rates, fares, tolls, rentals, charges or classifications, may also by order direct the public utility or railroad affected to pay into the hands of a trustee to be appointed by the court, from time to time, to be held until the final determination of the proceeding, under such conditions as the court may prescribe, all sums of money collected in excess of the sums payable if the order or decision of the commission had not been stayed or suspended.

Section 551.
Order to keep excess accounts pending review.

SECTION 40. In case the supreme court stays or suspends any order or decision lowering any rate, joint rate, fare, toll, rental, charge or classification, the commission, upon the execution and approval of said suspending bond may require the public utility or railroad affected, under penalty of the immediate enforcement of the order or decision of the commission, pending review, to keep such accounts, verified by oath, as may, in the judgment of the commission, be sufficient to show the amounts being charged or received by such public utility or railroad, in excess of the charges allowed by the order or decision of the commission, together with the names and addresses of the corporations or persons to whom overcharges will be refundable in case the charges made by the public utility or railroad, pending review, be not sustained by the supreme court.

Section 551-1.
Disposition of moneys charged in excess.

SECTION 41. Upon the final decision by the supreme court, all moneys which the public utility or railroad may have collected, pending the appeal, in excess of those authorized by such final decision, shall be promptly paid to the corporations or persons entitled thereto, in such manner and through such methods of distribution as may be prescribed by the court. If any such money shall not have been claimed by the corporations or persons entitled thereto within one year from the final decision of the supreme court, the trustees appointed by the court shall cause notice to such corporations or persons to be given by publication, once a week for two consecutive weeks, in a newspaper of general circulation, printed and published in the city of Columbus, Franklin county, Ohio, and such other newspaper or newspapers as may be designated by such trustee, said notice to state the names of the corporations or persons entitled to such moneys and the amount due each corporation or person. All moneys not claimed within three months after the publication of said notice shall be paid by the public utility or railroad, under the direction of such trustee, into the state treasury for the benefit of the general

fund, and the compensation

Section 551-2.

SECTION 42 or proceedings of railroad commission of Ohio, or by same may be prohibited as though this act abolished. Any order taken, commencing taking effect of to a final determination of the same effect as if this act. All provisions above named in this act and hereafter enacted, and all orders and decrees made hereunder, shall be null and void, and of no effect, and shall be deemed and construed to be null and void, and of no effect, in the manner

Section 551-3.

SECTION 43 of Ohio shall be void, whether a suit thereon be brought upon the same terms and conditions as though said law had not been re

Section 551-4.

SECTION 44 heretofore made above named act shall be of no effect as though promulgated u

Section 551-5.

SECTION 45 thereof is hereby and part of a thereof to be void and deemed to affect

Section 551-6.

SECTION 46 preme court, and proceedings to which parties, and in order, or under commission, to commission, shall be out of its order

SECTION 47 sections 548 to

the supreme court or delay any order or interfere with the performance of mandamus by a member thereof by

case it stays or suspension in any matter rentals, charges or the public utility is of a trustee to be held until the order or decision is suspended.

it stays or suspends joint rate, fare, toll, commission, upon the giving bond may be refused, under penalty of order or decision of such accounts, amount of the commission being charged or refund, in excess of the amount of the commission, of the corporations refundable in case of railroad, pending court.

to the supreme court, a railroad may cause of those authorized to be paid to the court, in such manner as may be prescribed shall not have been entitled thereto of the supreme court, shall cause notice to be given by publication, in a newspaper of the city of and such other newspapers or persons to be paid by the trustee of such trust of the general

fund, and the court may make such order with respect to the compensation of the trustee as it may deem proper.

Section 551-2.

SECTION 42. This act shall not affect pending actions or proceedings brought by or against the state of Ohio, the railroad commission of Ohio, the public service commission of Ohio, or by any other person or corporation, but the same may be prosecuted and defended with the same effect as though this act had not been passed or said commission abolished. Any investigation, hearing or examination undertaken, commenced, instituted or prosecuted prior to the taking effect of this act may be conducted and continued to a final determination in the same manner and with the same effect as if it had been undertaken, commenced, instituted or prosecuted in accordance with the provisions of this act. All proceedings hitherto taken by the commissions above named in any such investigation, hearing or examination and hereby ratified, approved, validated and confirmed, and all such proceedings shall have the same force and effect as if they had been undertaken, commenced, instituted and prosecuted under the provisions of this act and in the manner herein prescribed.

Act shall not affect pending actions.

Section 551-3.

SECTION 43. No cause of action arising under the laws of Ohio shall abate by reason of the passage of this act, whether a suit or action has been instituted thereon at the time of the taking effect of this act or not, but actions may be brought upon such causes in the same manner, under the same terms and conditions, and with the same effect as though said laws in force at the time this act takes effect had not been repealed.

Abatement.

Section 551-4.

SECTION 44. All orders, decisions, rules or regulations heretofore made, issued or promulgated by the commission above named shall continue in force and have the same effect as though they had been lawfully made, issued or promulgated under the provisions of this act.

Orders, decisions, etc., remain in force.

Section 551-5.

SECTION 45. Each section of this act and every part thereof is hereby declared to be an independent section, and part of a section, and the holding of a section or part thereof to be void or ineffective for any cause shall not be deemed to affect any other section or part thereof.

Each section independent.

Section 551-6.

SECTION 46. All actions and proceedings in the supreme court, under this chapter, and all actions or proceedings to which the commission or the state of Ohio may be parties, and in which any question arises under this chapter, or under or concerning any order or decision of the commission, to reverse, vacate or modify an order of the commission, shall be taken up and disposed of by the court out of its order on the docket.

Order of disposition of cases under chapter.

SECTION 47. That original sections 487 to 499 inclusive, sections 543 to 551 inclusive, sections 614, 614-24, 614-25,

Repeals.

Sec. 2450-6. Other provisions not affected.

SECTION 6. No provision of this act shall be construed to repeal or abrogate other provisions of the General Code authorizing contracts or agreements among particular classes of subdivisions, or to modify or impair the force of those provisions in respect of contracts or agreements entered into thereunder. Nor shall such other provisions be construed to control or limit the making of agreements under the authority of this act; it being intended that this act shall be applied as fully as though such other provisions did not exist.

J. FREER BITTINGER,
Speaker of the House of Representatives.

PAUL P. YODER,
President pro tem. of the Senate.

Passed April 3, 1935.

Approved April 15, 1935.

MARTIN L. DAVEY,
Governor.

The sectional numbers on the margin hereof are designated as provided by law.

JOHN W. BRICKER,
Attorney General.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 17th day of April, A. D. 1935.

File No. 48.

GEORGE S. MYERS,
Secretary of State.

(House Bill No. 42)

AN ACT

To establish a simplified method of appellate review; to enact sections 12223-1 to 12223-49, inclusive; to amend sections 11560, 11562, 11564, 11571, 11573, 11804, 13459-3, 13459-4, 13459-5, 13459-6, 13459-7, 13459-8, 13459-9, 13459-10, 13459-11, 13459-14, 10-4, 449, 544, 545, 546, 547, 548, 1258-2, 1258-3, 1258-4, 1258-5, 1668, 4551, 4735-173, 5611-2, 6212-20, 6477, 8572-50, 10459, 10461, 11064, 11230, 11864, 11864, 11865, 11866, 11867, 12363, 1709, 1558-26, 1579-36, 1579-307, 1579-440b, 1579-937, and to repeal sections 12223 to 12282, inclusive, 11066, 11561 and 11563 of the General Code.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 12223-1 to 12223-49, inclusive, of the General Code be enacted to read as follows:

Definitions.

Sec. 12223-1. 1. construed to mean all of a cause determined by or commission,

2. The "appeal on review of a cause upon deficiency of the evidence as otherwise designated in

3. The "appeal on mean a rehearing and r shall include all the pr an appeal, and shall be th on questions of fact."

What is a final order.

Sec. 12223-2. An when in effect it determ order affecting a substa a summary application i may be reviewed, affirm as provided in this title.

Final order may be a

Sec. 12223-3. Eve when provided by law, bunal, or commission i otherwise provided by le courts and of justices c be taken in the manner r to 1950-61, inclusive, a

Appeal deemed perfec

Sec. 12223-4. Thu notice of appeal shall i commission. Where le appeal shall also be filr fected, no appeal shall no step required to be j shall be deemed to be j

Notice of appeal.

Sec. 12223-5. The ment, or decree appealec

has been granted and in other respects such hearing shall follow the regular procedure in appealable cases which originate in the court of appeals. If any officer is removed and the law provides no means for filling the vacancy, the county board of deputy supervisors of elections in such county where such officer so removed resides shall order a special election to fill such vacancy in the unit of government in which such officer removed was elected.

Testimony; verdict; appeal; record of proceedings.

Sec. 449. The state shall open and close in giving testimony and in arguments. Upon request of the jurors the court may prepare the forms of verdict which shall be in writing, and shall be returned signed by the jurors or their foreman. A new trial shall not be granted except for misconduct of the jury or errors by the court. Exception to a ruling of the court in a matter of law may be taken as in other cases, and *** *an appeal on questions of law* may be prosecuted to the court of appeals if filed within thirty days from rendition of the verdict, and allowed by the court of appeals. Such proceedings shall not be reversed for error of form, or for other error not affecting the substantial rights of the parties. Each certificate of intention to appropriate property, with proof of service or publication of a copy thereof, and other proceedings in the probate court, shall be recorded by the probate judge.

Order may be reversed.

Sec. 544. A final order made by the commission shall be reversed, vacated or modified by the supreme court on *** *appeal*, if upon consideration of the record such court is of the opinion that such order was unlawful or unreasonable.

Notice of appeal seeking reversal, vacation or modification.

Sec. 545. The proceeding to obtain such reversal, vacation, or modification shall be by *** *notice of appeal*, filed *** *with the commission* by any party to the proceeding before the commission, against the public utilities commission of Ohio, setting forth *the order appealed from and the errors complained of*. *** *The notice of appeal shall be served, unless the same is duly waived*, upon the chairman of the commission, or, in the event of his absence, upon any member of the commission, or by leaving a copy at the office of the commission at the city of Columbus. The court may permit any interested party to intervene by *** *cross-appeal*.

Transcript.

Sec. 546. Upon service or waiver of the *** *notice of appeal* the commission shall forthwith transmit to the clerk of the supreme court a transcript of the journal entries, original papers or transcripts thereof

and a certified transcript of the commission in the said court.

Proceeding deemed e.

Sec. 547. No proceeding of the commission shall be deemed an *appeal* is filed within thirty days of the plain of upon the jo

Stay of execution.

Sec. 548. No proceeding rendered by the commission shall be deemed an *appeal* to the supreme court or a stay of execution shall be granted for thirty days' notice to the court *** *appellant* shall be required to give to the state of Ohio, in order to the satisfaction of the court, prompt payment by the appellant of the amount caused by the delay in the execution of the order for transportation, together with the charges fixed by the court to be sustained.

Order, how reversed

Sec. 1258-2. An order shall be reversed, vacated, or modified if upon consideration of the record such order was unlawful or

Proceeding institute

Sec. 1258-3. The proceeding to obtain such reversal, vacation, or modification shall be by *** *notice of appeal* filed with the commission by any party to the proceeding before the commission, against the public utilities commission of Ohio, setting forth *the order appealed from and the errors complained of*. *** *The notice of appeal shall be served, unless the same is duly waived*, upon the chairman of the commission, or, in the event of his absence, upon any member of the commission, or by leaving a copy at the office of the commission at the city of Columbus. The court may permit any interested party to intervene by *** *cross-appeal*.

Note: The word "appeal" is spelled in the enrolled bill

hearing shall follow the
in the court of ap-
w. provides no means for
y supervisors of elections
causes shall order a special
government in which such

Proceedings.

in giving testimony and
the court may prepare the
and shall be returned signed
shall not be granted except
court. Exception to a ruling
as in other cases, and
prosecuted to the court of
petition of the verdict, and
findings shall not be reversed
affecting the substantial rights
of appropriate property, with
costs, and other proceedings in
the case judge.

Commission shall be reversed,
*** appeal, if upon con-
sideration that such order was

Reversal or modification.

reversal, vacation, or modi-
*** with the commission
against the public
order appealed from and
shall be served, unless
the commission, or, in the
commission, or by leaving
of Columbus. The court
*** cross-appeal.

*** notice of appeal the
of the supreme court a-
nders or transcripts thereof

and a certified transcript of all evidence adduced upon the hearing before
the commission in the proceeding complained of, which shall be filed in
said court.

Proceeding deemed commenced, when.

Sec. 547. No proceeding to reverse, vacate or modify a final order
of the commission shall be deemed commenced unless the *** notice of
appeal is filed within sixty days after the entry of the final order com-
plained of upon the journal of the commission.

Stay of execution.

Sec. 548. No proceeding to reverse, vacate or modify a final order
rendered by the commission shall operate to stay execution thereof unless
the supreme court or a judge thereof in vacation, on application and three
days' notice to the commission, shall allow such stay, in which event the
*** appellants shall be required to execute an undertaking, payable to
the state of Ohio, in such a sum as the court may prescribe, with surety
to the satisfaction of the clerk of the supreme court, conditioned for the
prompt payment by the *** appellants of all damages arising from or
caused by the delay in the enforcement of the order complained of, and
for the repayment of all moneys paid by any person, firm or corporation
for transportation, transmission, produce, commodity or service in excess
of the charges fixed by the order complained of, in the event such order
be sustained.

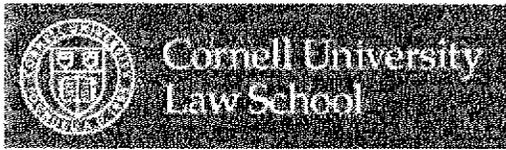
Order, how reversed, vacated or modified.

Sec. 1258-2. An order as made by the commissioner or director of
health or as approved or modified by the referees as herein provided, shall
be reversed, vacated or modified by the supreme court on *** appeal,
if upon consideration of the record such court is of the opinion that such
order was unlawful and unreasonable.

Proceeding instituted by notice of appeal; service of notice.

Sec. 1258-3. The proceeding to obtain such reversal, vacation or
modification shall be *** instituted by notice of appeal, filed ***
with the commissioner or director by the municipal corporation, managing
board of officers of a public institution, corporation, partnership or person
to which such order of the commissioner or director of health shall apply,
setting forth the order appealed from and the errors complained of. ***
*** The notice of appeal shall be served unless waived, upon the com-
missioner or director of health, or in his absence by leaving a copy at his
office in the city of Columbus.

NOTE: The word "municipal" in the third line of Sec. 1258-3 appears as it is
spelled in the enrolled bill. [Editor.]



LII / Legal Information Institute

United States Constitution

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

-
- [Previous Amendment](#) -- [Next Amendment](#)
 - [Table of Articles and Amendments](#)

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- Overview of Full Constitution
-

**VECTREN ENERGY DELIVERY OF OHIO, INC.
CASE NOS. 07-1080-GA-AIR AND 07-1081-GA-ALT
PROPOSED NOTICE FOR NEWSPAPER PUBLICATION**

**NOTICE OF APPLICATION FOR AUTHORITY
TO INCREASE RATES AND CHARGES
VECTREN ENERGY DELIVERY OF OHIO, INC.
PUCO CASE NOS. 07-1080-GA-AIR AND 07-1081-GA-ALT**

Pursuant to Section 4909.19, Revised Code, Vectren Energy Delivery of Ohio, Inc. ("VEDO") hereby gives notice that, on November 20, 2007, it filed an Application with the Public Utilities Commission of Ohio ("Commission") in PUCO Case Nos. 07-1080-GA-AIR requesting authority to increase the rates and charges for natural gas distribution service provided to its customers.

This notice describes the substance of the Application. However, any interested party seeking detailed information with respect to all affected rates, charges, regulations and practices may inspect a copy of the Application, including supporting schedules and present and proposed rate sheets, by either of the following methods: by visiting the offices of the Commission at 180 East Broad Street, 13th floor, Columbus, Ohio 43215-3793; or by visiting the Commission's website at <http://www.puco.ohio.gov>, selecting DIS, inputting 07-1080 in the case lookup box, and selecting the date the Application was filed. Additionally, a copy of the Application and supporting documents may be viewed at the business office of VEDO at 1335 E. Dayton-Yellow Springs Road, Fairborn, Ohio 45324, during normal business hours. A notice of intent to file this rate increase application and a copy of the proposed rates were mailed to the mayors and legislative authorities of communities located within the areas served by VEDO and filed with the Commission on September 28, 2007.

The Application is made pursuant to Section 4909.18, Revised Code, and related sections of the Ohio Revised Code for authority to make changes and increases in gas rates applicable in incorporated communities and unincorporated territory within VEDO's entire service area, which includes all or parts of Auglaize, Butler, Champaign, Clark, Clinton, Darke, Fayette, Greene, Highland, Logan, Madison, Miami, Montgomery, Pickaway, Preble, Shelby and Warren Counties in Ohio.

Any person, firm, corporation or association may file, pursuant to Section 4909.19 of the Revised Code, an objection to such proposed increased rates by alleging that such proposals are unjust and discriminatory or unreasonable. Recommendations that differ from the Application may be made by the Staff of the Commission or by intervening parties and may be adopted by the Commission.

The current base rates and charges became effective in April 2005. In that case, VEDO, the Staff of the Commission and other parties agreed to a \$15.7 million increase, which was approved by the Commission. The modest 2005 increase resulted in a 4.3% increase in customer bills. The Application states that the current rates and charges do not provide a just and reasonable rate of return on VEDO's used and useful property as of August 31, 2007, the date certain in this case. The Application states that VEDO requires the proposed revenue increase to provide an opportunity to earn a fair return on its assets and to recover costs of operation.

In the Application, VEDO proposes changes to its rate schedules to reflect increases to the cost of service. Additionally, VEDO proposes changes to the rate design for Rate 310 (Residential Sales Service) and Rate 315 (Residential Transportation Service) that initiate a gradual transition to a straight fixed variable rate for distribution service. Proposed Changes to Rate 320 (General Sales Service) and Rate 325 (General Transportation Service) include the increased customer charges that form the basis for a planned elimination of the volumetric charge component of the rates for these services. The Application proposes elimination of Rate 340, Interruptible Sales Service, and retains the Rate 330, Large General Sales Service, and the Rate 341, Dual Fuel Sales Service, and Rate 345, Large General Transportation Service, rate schedules and the Pooling Service for Residential and General (Choice) customers. The Application adds a Rate 360, Large Volume Transportation Service and extends application of Rate 380 (Pooling Service) to Large General and Large Volume Transportation Customers. Finally, the Application also includes a proposal for the funding of demand side management ("DSM") programs.

A description of the proposed changes to the terms and conditions applicable to gas service, the proposed rates, and the average percentage increase in operating revenue requested by the utility on a rate schedule basis is set forth below.

RATE 310
RESIDENTIAL SALES SERVICE

RATES AND CHARGES

The monthly Rates and Charges for Gas Service under this Rate Schedule shall be:

Customer Charge:

\$16.75 per meter (November – April)

\$10.00 per meter (May – October)

Volumetric Charge:

\$0.11937 per Ccf for the first 50 Ccf, plus

\$0.10397 per Ccf for all Ccf over 50 Ccf

Riders:

The following Riders shall be applied monthly:

- Sheet No. 31 – Gas Cost Recovery Rider
- Sheet No. 35 – Migration Cost Rider
- Sheet No. 37 – Gross Receipts Excise Tax Rider

- Sheet No. 38 – Distribution Replacement Rider
- Sheet No. 39 – Uncollectible Expense Rider
- Sheet No. 40 – Percentage of Income Payment Plan Rider
- Sheet No. 42 – S.B. 287 Excise Tax Rider
- Sheet No. 43 – Sales Reconciliation Rider – A
- Sheet No. 44 – Sales Reconciliation Rider – B

Minimum Monthly Charge:

The Minimum Monthly Charge shall be the Customer Charge.

Miscellaneous Charges:

The Miscellaneous Charges set forth in Sheet No. 30, Miscellaneous Charges, shall be charged to Customer if applicable.

The average proposed increase for this customer class is 7.80%.

RATE 315
RESIDENTIAL TRANSPORTATION SERVICE

RATES AND CHARGES

The monthly Rates and Charges for Gas Service under this Rate Schedule shall be:

Customer Facilities Charge:

\$16.75 per meter (November – April)
\$10.00 per meter (May – October)

Volumetric Charge:

\$0.11937 per Ccf for the first 50 Ccf, plus
\$0.10397 per Ccf for all Ccf over 50 Ccf

Riders:

The following Riders shall be applied monthly:

- Sheet No. 35 – Migration Cost Rider
- Sheet No. 37 – Gross Receipts Excise Tax Rider
- Sheet No. 38 – Distribution Replacement Rider
- Sheet No. 39 – Uncollectible Expense Rider
- Sheet No. 40 – Percentage of Income Payment Plan Rider
- Sheet No. 42 – S.B. 287 Excise Tax Rider
- Sheet No. 43 – Sales Reconciliation Rider – A
- Sheet No. 44 – Sales Reconciliation Rider – B

Minimum Monthly Charge:

The Minimum Monthly Charge shall be the Customer Charge.

Miscellaneous Charges:

The Miscellaneous Charges set forth in Sheet No. 30, Miscellaneous Charges, shall be charged to Customer if applicable.

The average proposed increase for this customer class is 34.36%.

RATE 320
GENERAL SALES SERVICE

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RATES AND CHARGES

The monthly Rates and Charges for Gas Service under this Rate Schedule shall be:

Customer Charge:

Group 1: \$20.00 per meter
Group 2: \$40.00 per meter
Group 3: \$80.00 per meter

Volumetric Charge:

\$0.12002 per Ccf for the first 50 Ccf, plus
\$0.10284 per Ccf for all Ccf over 50 Ccf

Riders:

The following Riders shall be applied monthly:

- Sheet No. 31 – Gas Cost Recovery Rider
- Sheet No. 35 – Migration Cost Rider
- Sheet No. 37 – Gross Receipts Excise Tax Rider
- Sheet No. 38 – Distribution Replacement Rider
- Sheet No. 39 – Uncollectible Expense Rider
- Sheet No. 40 – Percentage of Income Payment Plan Rider
- Sheet No. 42 – S.B. 287 Excise Tax Rider
- Sheet No. 43 – Sales Reconciliation Rider – A
- Sheet No. 44 – Sales Reconciliation Rider – B

Minimum Monthly Charge:

The Minimum Monthly Charge shall be the Customer Charge.

Miscellaneous Charges:

The Miscellaneous Charges set forth in Sheet No. 30, Miscellaneous Charges, shall be charged to Customer if applicable.

The average proposed increase for customers presently receiving Non-Residential General Sales Service is 3.37% (1.44% for federal government customers).

RATE 325 GENERAL TRANSPORTATION SERVICE

RATES AND CHARGES

The monthly Rates and Charges for Gas Service under this Rate Schedule shall be:

Customer Charge:

Group 1: \$20.00 per meter
Group 2: \$40.00 per meter
Group 3: \$80.00 per meter

Volumetric Charge:

\$0.12002 per Ccf for the first 50 Ccf, plus
\$0.10284 per Ccf for all Ccf over 50 Ccf

Riders:

The following Riders shall be applied monthly:

- Sheet No. 35 – Migration Cost Rider
- Sheet No. 37 – Gross Receipts Excise Tax Rider
- Sheet No. 38 – Distribution Replacement Rider
- Sheet No. 39 – Uncollectible Expense Rider

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- Sheet No. 40 – Percentage of Income Payment Plan Rider
- Sheet No. 42 – S.B. 287 Excise Tax Rider
- Sheet No. 43 – Sales Reconciliation Rider – A
- Sheet No. 44 – Sales Reconciliation Rider – B

Minimum Monthly Charge:

The Minimum Monthly Charge shall be the Customer Charge.

Miscellaneous Charges:

The Miscellaneous Charges set forth in Sheet No. 30, Miscellaneous Charges, shall be charged to Customer if applicable.

The average proposed increase for customers presently receiving Non-Residential General Transportation Service is 12.90% (28.67% for federal government customers).

RATE 330
LARGE GENERAL SALES SERVICE

RATES AND CHARGES

The monthly Rates and Charges for Gas Service under this Rate Schedule shall be:

Customer Charge:

\$150.00 per Meter

Volumetric Charge:

\$0.09909 per Ccf for the first 15,000 Ccf, plus
\$0.08794 per Ccf for all Ccf over 15,000 Ccf

Riders:

The following Riders shall be applied monthly:

- Sheet No. 31 – Gas Cost Recovery Rider
- Sheet No. 37 – Gross Receipts Excise Tax Rider
- Sheet No. 38 – Distribution Replacement Rider
- Sheet No. 39 – Uncollectible Expense Rider
- Sheet No. 40 – Percentage of Income Payment Plan Rider
- Sheet No. 42 – S.B. 287 Excise Tax Rider

Minimum Monthly Charge:

The Minimum Monthly Charge shall be the Customer Charge.

Miscellaneous Charges:

Miscellaneous Charges set forth in Sheet No. 30, Miscellaneous Charges, shall be charged to Customer if applicable.

The average proposed decrease for customers receiving Non-Residential Large General Sales Service is 0.06% (0.66% increase for federal government customers).

RATE 341
DUAL FUEL SALES SERVICE

RATES AND CHARGES

The monthly Rates and Charges for Gas Service under this Rate Schedule shall be:

Customer Facilities Charge:
\$50.00 per meter

Volumetric Charge:
\$0.04940 per Ccf for all Ccf of Process or Base Deliveries (as defined below), plus
\$0.02207 per Ccf for all Ccf of Dual Fuel Deliveries (as defined below)

Riders:

The following Riders shall be applied monthly:

- Sheet No. 31 – Gas Cost Recovery Rider
- Sheet No. 37 – Gross Receipts Excise Tax Rider
- Sheet No. 38 – Distribution Replacement Rider
- Sheet No. 39 – Uncollectible Expense Rider
- Sheet No. 40 – Percentage of Income Payment Rider
- Sheet No. 42 – S. B. 287 Excise Tax Rider

Minimum Monthly Charge:

The Minimum Monthly Charge shall be the Customer Charge.

Miscellaneous Charges:

The Miscellaneous Charges set forth in Sheet No. 30, Miscellaneous Charges, shall be charged to Customer if applicable.

The average proposed increase for this rate schedule is 1.42%.

RATE 345
LARGE GENERAL TRANSPORTATION SERVICE

RATES AND CHARGES

The monthly Rates and Charges for Gas Service under this Rate Schedule shall be:

Customer Facilities Charge:
\$150.00 per meter

Volumetric Charge:
\$0.09909 per Ccf for the first 15,000 Ccf, plus
\$0.08794 per Ccf for all Ccf over 15,000 Ccf

Riders:

The following Riders shall be applied monthly:

- Sheet No. 37 – Gross Receipts Excise Tax Rider
- Sheet No. 38 – Distribution Replacement Rider
- Sheet No. 42 – S.B. 287 Excise Tax Rider

Minimum Monthly Charge:

The Minimum Monthly Charge shall be the Customer Charge.

Additional Services Charges:

Customer shall pay the appropriate rates and charges for any additional service provided by Company, as described in the Transportation Terms and Conditions (Large General and Large Volume), and any charge assessed in accordance with orders issued by Commission relating to take-or-pay, transition, or other costs.

Competitive Flexibility:

000034

The above Rates and Charges may be reduced, in Company's reasonable discretion, as necessary to retain or attract Customer's gas load.

Miscellaneous Charges:

The Miscellaneous Charges set forth in Sheet No. 30, Miscellaneous Charges, shall be charged to Customer if applicable.

The average proposed decrease for this customer class is 0.74%.

RATE 360
LARGE VOLUME TRANSPORTATION SERVICE

RATES AND CHARGES

The monthly Rates and Charges for Gas Service under this Rate Schedule shall be:

Customer Charge:

\$500.00 per meter

Volumetric Charge:

\$0.08613 per Ccf for the first 50,000 Ccf, plus
\$0.07513 per Ccf for the next 150,000 Ccf, plus
\$0.05727 per Ccf for all Ccf over 200,000 Ccf

Riders:

The following Riders shall be applied monthly:

- Sheet No. 37 – Gross Receipts Excise Tax Rider
- Sheet No. 38 – Distribution Replacement Rider
- Sheet No. 42 – S.B. 287 Excise Tax Rider

Minimum Monthly Charge:

The Minimum Monthly Charge shall be the Customer Charge.

Additional Services Charges:

Customer shall pay the appropriate rates and charges for any additional service provided by Company, as described in the Transportation Terms and Conditions (Large General and Large Volume), and any charge assessed in accordance with orders issued by Commission relating to take-or-pay, transition, or other costs.

Competitive Flexibility:

The above Rates and Charges may be reduced, in Company's reasonable discretion, as necessary to retain or attract Customer's gas load.

Miscellaneous Charges:

The Miscellaneous Charges set forth in Sheet No. 30, Miscellaneous Charges, shall be charged to Customer if applicable.

The average proposed decrease for former Rate 330 Customers moving to this Rate Schedule is 0.84%. The average proposed increase for former Rate 345 Customers moving to this Rate Schedule is 1.05%.

RATE 380
POOLING SERVICE
(LARGE GENERAL AND LARGE VOLUME)

000035

CHARGES

Pool Operator's Bill shall be rendered monthly, and shall consist of the following charges, as applicable:

Financial Evaluation Fee: \$50 for the initial and each subsequent Pool Operator financial evaluation performed by Company.

Nomination and Balancing Charges: All nomination and balancing charges and imbalance trading charges associated with Pool Operator's Pool, including those listed in Sheet No. 51, Nomination and Balancing Provisions (Large General, Large Volume, and Pool Operator), shall be billed to Pool Operator each month.

Related Charges: Pool Operator shall reimburse Company for all charges incurred in connection with interstate pipeline transportation of Pool Operator-Delivered Gas including any gas costs, penalty charges, or Cashouts.

Riders: The following Riders shall be applied monthly:

- Sheet No. 37 – Gross Receipts Excise Tax Rider

Late Payment Charge: Payment of the total Bill amount due must be received by Company or an authorized agent by the due date shown on Pool Operator's invoice. If Pool Operator does not pay the total amount due by the date shown, an additional amount equal to one and one half percent (1.5%) of the total unpaid balance shall also become due and payable.

Returned Check Charge: The Returned Check Charge contained on Sheet No. 30, Miscellaneous Charges, shall be added to Pool Operator's account each time a check is returned by the financial institution for insufficient funds.

Unauthorized Gas Usage Charge: The Unauthorized Gas Usage Charge set forth in Sheet No. 30, Miscellaneous Charges, shall be charged to Pool Operator, if applicable.

The average proposed increase for this customer class is 0%

RATE 385 POOLING SERVICE (RESIDENTIAL AND GENERAL)

FEES AND CHARGES

Supplier shall be assessed the following fees and charges, on a non-discriminatory basis, based upon Supplier's election, Company's initiation and/or Supplier's balancing activities:

Financial Evaluation Fee:

\$50 for the initial and each subsequent Supplier financial evaluation performed by Company.

Eligible Customer List Fee:

Under the annual option, \$.08 for each name included on the initial list, with updated lists provided the three subsequent quarters at no additional cost. Under the quarterly option, \$.05 for each name included on the list. Such lists shall be produced quarterly; if Supplier desires the list more frequently, Supplier shall reimburse Company for any costs incurred in addition to this per-customer rate.

DDQ Non-Compliance Charge:

\$1 per Dth on days in which no Operational Flow Order (OFO) is in effect (provided no alternate arrangements are made with Company) against: 1) the daily difference between the Pool's DDQ and aggregate deliveries, 2) the daily difference between the minimum allowable volume

000036

identified by Company that may be delivered by a specific interstate pipeline or to a specific Company city gate on a Pool's behalf and the Pool's actual deliveries by that interstate pipeline or to that city gate greater than such minimum allowable volume for that day, and 3) the difference between the maximum allowable volume identified by Company that may be delivered by a specific interstate pipeline or to a specific Company city gate on a Pool's behalf and the actual deliveries by that interstate pipeline or to that city gate less than the maximum allowable volume for that day.

OFO Non-Compliance Charge:

\$30 per Dth applied to the difference between Supplier's DDQ and actual deliveries if Supplier over-delivers on days in which a low demand OFO is in effect or under-delivers on days in which a high demand OFO is in effect.

Pool-to-Pool Transfer Fee:

\$10.00 shall be assessed to the selling party for each transaction.

Peaking Supplies Charge:

All peaking supplies (including but not limited to vaporized propane) provided by Company for Supplier's Pool as set out in the Allocation of Peaking Supplies section of the Pooling Service Terms and Conditions (Residential and General) shall be billed to Supplier at Company's fully allocated cost of such supply.

Additional Service Charges:

Fees and Charges for any other service shall be established by Company and assessed on a non-discriminatory basis. If Supplier desires a billing service or custom rate that is not readily available in Company's billing system, Supplier and Company shall negotiate a fee that shall include all programming costs associated with such custom billing requirements.

Riders:

The following Riders shall be applied monthly:

- Sheet No. 36 – Balancing Cost Rider
- Sheet No. 37 – Gross Receipts Excise Tax Rider

Late Payment Charge:

Payment of the total Bill amount due must be received by Company or an authorized agent by the due date shown on Supplier's invoice. If Supplier does not pay the total amount due by the date shown, an additional amount equal to one and one half percent (1.5%) of the total unpaid balance shall also become due and payable.

Returned Check Charge:

The Returned Check Charge contained on Sheet No. 30, Miscellaneous Charges, shall be added to Supplier's account each time a check is returned by the financial institution for insufficient funds.

The average proposed increase for this rate schedule is 0%.

OTHER RATE CHANGES

The Application adds or modifies several riders. The Reconnection charges, both at the meter and at the service line, are moved uniformly to \$60.00 and a new Avoided Customer Charges section is proposed. Also, trip and labor charges are increased to \$35.00 for normal business hours and \$57.00 outside of normal business hours and are proposed as flat rates instead of per 15 minute charges. Additionally, a collection charge of \$17.00 at the door is proposed.

000037

A description of the proposed changes to the miscellaneous charges, the proposed rates, and the average percentage increase in operating revenue requested by the utility on a rate schedule basis are set forth below.

Additionally, VEDO has proposed an initial rate for its Sales Reconciliation Rider-A ("SRR-A") as approved in Case No. 05-1444-GA-UNC as reflected below.

SALES RECONCILIATION RIDER – A

APPLICABILITY

The Sales Reconciliation Rider – A (SRR-A) shall be applicable to all Customers served under the following Rate Schedules:

Rate 310 – Residential Sales Service and Rate 315 – Residential Transportation Service

Rate 320 – General Sales Service and Rate 325 – General Transportation Service

This Rider shall cease after recovery of all amounts authorized for recovery in Case No. 05-1444-GA-UNC.

DESCRIPTION

The SRR-A shall recover the differences between Actual Base Revenues and Adjusted Order Granted Base Revenues for the applicable Rate Schedules.

Actual Base Revenues are defined as weather-normalized monthly base revenues for such Rate Schedules, prior to the SRR-A adjustment.

Adjusted Order-Granted Base Revenues are defined as the monthly base revenues for the applicable Rate Schedules as approved by the Commission's Order in Company's last base rate case, as adjusted to reflect the change in number of customers from the levels approved by the Commission. To reflect the change in number of customers, Order-granted base revenue per customer is multiplied by the net change in number of customers since the like month during the test year, with the product being added to the Order-granted base revenues for such month.

Company shall defer the calculated differences between Actual Base Revenues and Adjusted Order Granted Base Revenues for the applicable Rate Schedules for subsequent return or recovery via the SRR-A. Company shall reflect in a revised SRR-A effective November 1st of each year the accumulated monthly differences between Actual Base Revenues and Adjusted Order Granted Base Revenues.

The accumulated monthly differences for each Rate Schedule shall be divided by projected sales volumes to determine the applicable SRR-A. Projected and actual recoveries by Rate Schedule under the SRR-A are reconciled, with any under or over recovery being recovered or returned via the SRR-A over the next twelve months.

SALES RECONCILIATION RIDER – A RATE

The applicable Sales Reconciliation Rider – A Rate below shall be applied to each Ccf of metered gas usage each month.

Rates in \$/Ccf

Rate Schedules

310 and 315

320 and 325

SRR-A

\$0.02294

\$0.00278

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If payment is made to an employee whose authorized purpose was to disconnect service and who is authorized to accept such payment, or to an employee dispatched to the premises to accept payment, a charge of \$17.00 may be assessed on each of such visits and shall be payable at the time of such visit.

The total proposed Miscellaneous Charges revenue increase is 5.035%.

Alternative Regulation Proposals

In addition to the above described Application, included in this filing are alternative regulation plan proposals to recover costs associated with the enhancement and replacement of VEDO's aging natural gas infrastructure in addition to other programs and services needed to continue safe energy delivery. Specifically, VEDO seeks approval of a Distribution Replacement Rider ("DRR") to recover (1) a return on and of incremental annual costs incurred under a twenty (20) year program for the accelerated replacement and retirement of cast iron mains and bare steel mains and service lines and (2) individual riser replacements arising from VEDO's investigation of the installation, use, and performance of natural gas service risers. As part of the program, VEDO also proposes to assume ownership of that portion of service lines which are currently customer-owned (i.e. the property line-to-meter portion, including the riser) upon replacement and to recover any incremental costs of assuming ownership of these service lines in the DRR. Finally, in addition to assuming ownership of (and therefore maintenance responsibility for) replaced service lines, VEDO proposes to also assume maintenance responsibility for customer-owned service lines and recover the incremental cost in the DRR.

A description of the proposed DRR and the proposed rates requested by the utility on a rate schedule basis are set forth below.

DISTRIBUTION REPLACEMENT RIDER

APPLICABILITY

The Distribution Replacement Rider (DRR) is applicable to any Customer served under the Rate Schedules identified below.

- Rate 310 - Residential Sales Service
- Rate 315 - Residential Transportation Service
- Rate 320 - General Sales Service
- Rate 325 - General Transportation Service
- Rate 330 - Large General Sales Service
- Rate 341 - Dual Fuel Sales Service
- Rate 345 - Large General Transportation Service
- Rate 360 - Large Volume Transportation Service

DESCRIPTION

All applicable Customers shall be assessed either (a) a monthly charge in addition to the Customer Charge component of their applicable Rate Schedule, or (b) a volumetric charge applicable to each Ccf of metered gas usage each month, that will enable Company to recover (1) the return on and of annual costs incurred under a twenty (20) year program for the accelerated replacement and retirement of cast iron mains and bare steel mains and service lines, (2) individual riser replacements

arising from Company's investigation of the installation, use, and performance of natural gas service risers, (3) the incremental costs attributable to assuming ownership of service lines installed or replaced by Company and (4) the incremental cost of assuming maintenance responsibility for all service lines.

The DRR will be updated annually, in order to reflect the impact on Company's revenue requirement of net plant additions and other applicable, incremental costs, as offset by maintenance expense reductions attributable to the replacement program. Actual costs and actual recoveries are reconciled annually, with any under or over recovery being recovered or returned over the next twelve month period.

DISTRIBUTION REPLACEMENT RIDER CHARGE

The charges for the respective Rate Schedules are:

<u>Rate Schedule</u>	<u>\$ Per Month</u>	<u>\$ Per Ccf</u>
310, Residential Sales	\$0.00	
315, Residential Transportation	\$0.00	
320, General Sales (Group 1)	\$0.00	
320, General Sales (Group 2 and 3)		\$0.00000
325, General Transportation (Group 1)	\$0.00	
325, General Transportation (Group 2 and 3)		\$0.00000
330, Large General Sales		\$0.00000
341, Dual Fuel Sales	\$0.00	
345, Large General Transportation		\$0.00000
360, Large Volume Transportation		\$0.00000

This is a new charge.

VEDO further proposes to assume responsibility for installation and ownership of new service lines installed on and after the date on which this proposal is approved by the Commission. Requests for recovery of costs associated with installation of new service lines will be sought in future rate case proceedings. No such recovery will be requested in the DRR.

Additionally, in the alternative regulation plan, VEDO seeks approval of a Sales Reconciliation Rider ("SRR-B") which will supercede the current Sales Reconciliation Rider, which was approved in Case No. 05-1444-GA-UNC for the recovery of defined amounts of the difference between the actual and approved base rate revenues (adjusted for normal weather and customer additions). The SRR-B proposed in this proceeding is designed to complement the rate design proposal that moves gradually to a straight fixed variable rate by recovering the difference between VEDO's actual base rate revenues and the revenues approved in the current rate case, as adjusted for customer additions.

A description of the proposed SRR-B, and the terms and conditions of the SRR-B on a rate schedule basis are set forth below.

SALES RECONCILIATION RIDER - B

APPLICABILITY

The Sales Reconciliation Rider - B (SRR-B) shall be applicable to all Customers served under the following Rate Schedules:

Rate 310 – Residential Sales Service and Rate 315 – Residential Transportation Service
Rate 320 – General Sales Service and Rate 325 – General Transportation Service

DESCRIPTION

The SRR-B shall recover the differences between Actual Base Revenues and Adjusted Order Granted Base Revenues for the applicable Rate Schedules.

Actual Base Revenues are defined as monthly base revenues for such Rate Schedules, prior to the SRR-B adjustment.

Adjusted Order-Granted Base Revenues are defined as the monthly base revenues for the applicable Rate Schedules as approved by the Commission's Order in Company's last base rate case, as adjusted to reflect the change in number of customers from the levels approved by the Commission. To reflect the change in number of customers, Order-granted base revenue per customer is multiplied by the net change in number of customers since the like month during the test year, with the product being added to the Order-granted base revenues for such month.

Company shall defer the calculated differences between Actual Base Revenues and Adjusted Order Granted Base Revenues for the applicable Rate Schedules for subsequent return or recovery via the SRR-B. Company shall reflect in a revised SRR-B effective November 1st of each year the accumulated monthly differences between Actual Base Revenues and Adjusted Order Granted Base Revenues.

The accumulated monthly differences for each Rate Schedule shall be divided by projected sales volumes to determine the applicable SRR-B. Projected and actual recoveries by Rate Schedule under the SRR-B are reconciled, with any under or over recovery being recovered or returned via the SRR-B over the next twelve months.

SALES RECONCILIATION RIDER – B RATE

The applicable Sales Reconciliation Rider – B Rate below shall be applied to each Ccf of metered gas usage each month.

Rates in \$/Ccf

<u>Rate Schedules</u>	<u>SRR-B</u>
310 and 315	\$0.00000
320 and 325	\$0.00000

This is a new service.

In its alternative regulation proposal, VEDO seeks approval for cost recovery of several programs to ensure system integrity and reliability. Specifically, VEDO proposes to recover the costs to improve its gas distribution system through a proactive, preventative maintenance program designed to achieve asset longevity, integrity, and reliability. VEDO's pressure regulating stations are critical assets to the distribution system and will have a 5-year preventative maintenance schedule. These proactive activities place greater emphasis on planned preventative maintenance which increases the life expectancy of these stations and reduces future maintenance costs. Similarly, VEDO will implement a ten-year clearing schedule and annual maintenance for 248 miles of transmission pipeline (that portion of the pipeline not included in the Integrity Management Program) and 259 miles (5% of total) of distribution pipeline in order to ensure the Rights-of-Way are properly maintained. Finally, in order to address the utility-wide concern regarding

future shortages of skilled employees to replace an aging workforce, VEDO plans to hire apprentices in critical bargaining unit employee groups where trained Energy Delivery workers are essential to providing gas services to VEDO's customers. The costs of many of these programs are included in test-year operating expenses in VEDO's revenue requirement calculation.

The above proposed provisions, rates, and charges are subject to changes, including changes as to the amount and form, by the Commission following a public hearing on the Application.

Since the rates, prices, charges and other provisions in the currently effective rate schedules do not provide just and reasonable compensation for supplying gas service to the customers to which they are applicable, do not yield a just and reasonable return on the value of the property actually used and useful in furnishing such gas service, and result in the taking of VEDO's property for public use without compensation and without due process of law, VEDO respectfully requests that the Commission issue Orders that grant the following prayers for relief:

- 1) Find that the rates and charges now being charged and collected by VEDO for natural gas services are insufficient to provide it with reasonable compensation and return for the services rendered and are, therefore, unjust and unreasonable;
- 2) Find that the rates and charges proposed in the Application are just and reasonable and approve same;
- 3) Approve the filing of the proposed tariff sheets contained in the Application, subject to such modifications as the Commission may order;
- 4) Order that the revised tariff sheets become effective as of the earliest date permitted by law, and authorize the withdrawal of the tariff sheets they replace;
- 5) Find that the rates and charges proposed in the Alternative Regulation Plan are just and reasonable and approve same; and
- 6) Grant such other relief to which VEDO may be reasonably entitled.

The form of this notice has been approved by the Commission

Vectren Energy Delivery of Ohio, Inc.

1 APPEARANCES:

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Wednesday Morning Session,
August 20, 2008.

- - -

ATTORNEY EXAMINER: Let's go on the record. Good morning. The Public Utilities Commission has set for hearing at this time and this place Case No. 07-1080-GA-AIR, et al., In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc., for Authority to Amend Its Filed Tariffs to Increase the Rates and Charges for Gas Service and Related Matters.

My name is Gregory Price. I am the Attorney Examiner assigned to preside over this hearing. This is our second day of hearing in this proceeding; therefore, I would like to start by taking abbreviated appearances just so we have a record of who all is in the hearing room at this time starting with the company.

MS. HUMMEL: Thank you, your Honor. On behalf of Vectren Energy Delivery of Ohio, McNeese, Wallace & Nurick, by Sam C. Randazzo, Gretchen J. Hummel, Joseph M. Clark, 21 East State Street, Columbus, Ohio 43215, and Lawrence K. Friedeman, vice president and deputy general counsel of Vectren

1 MS. GRADY: Mr. Ulrey, that's all the
2 questions I have. I am now going to turn you over to
3 Mr. Serio, if the bench will allow.

4 ATTORNEY EXAMINER: Let's go off the
5 record for one moment.

6 (Recess taken.)

7 ATTORNEY EXAMINER: Let's go back on the
8 record. Mr. Serio.

9 MR. SERIO: Thank you, your Honor.

10 - - -

11 CROSS-EXAMINATION (Continued)

12 By Mr. Serio:

13 Q. Good morning, Mr. Ulrey.

14 A. Good morning.

15 Q. You are the policy witness behind the
16 company's proposal to implement the fixed variable
17 rate design, correct?

18 A. Correct.

19 Q. And by straight fixed variable we are
20 referring to an increase in the recovery of the fixed
21 charge and a decrease in the recovery on the
22 volumetric charge, correct?

23 A. An official definition of straight fixed
24 variable would be only a customer charge and no

1 volumetric charge. The way it's evolved in Ohio we
2 are now talking in terms of partial straight fixed
3 variable and full straight fixed variable. Under
4 partial straight fixed variable there are increases
5 to the customer charge, decreases to the volumetric
6 charge, but the volumetric charge remains nonzero.

7 Q. Okay. And am I correct that the main
8 driver behind the company wanting to go to a straight
9 fixed variable rate design is the steadily decreasing
10 average usage per customer that the company has
11 experienced?

12 A. That's an important consideration but
13 it's by no means the only consideration. The
14 testimony of Mr. Overcast in this proceeding
15 describes a number of other reasons to pursue
16 movement to straight fixed variable.

17 Q. You referenced in your testimony some
18 American Gas Association studies that supported or
19 documented the decreases in annual sales. Do you
20 recall that?

21 A. Yes, I do.

22 Q. When you were looking at those studies,
23 did the company assume that decreases in sales per
24 customer are going to continue at the same pace, or

1 is there some point in time where it's your belief
2 that customers will have learned to have conserved
3 about as much as they can and there is a base level
4 of usage that's required by a customer in the Midwest
5 in order to keep warm in the wintertime?

6 A. There are many factors that impact
7 average use per customer. I've been in the gas
8 business for 27 or 8 years, and the average use per
9 customer when I came in the business at Indiana Gas
10 Company was about 141 dekatherms per customers. It's
11 dropped in Indiana to in the 80s. It's had varying
12 percentage reductions each year.

13 Some of it related to more efficient
14 appliances being mandated by the Federal Government.
15 Some of it had to do with higher -- tighter homes as
16 far as insulation, set back thermostats, a number of
17 things continue to change, but the downward trend
18 continues. It's our concern is that it will continue
19 to accelerate or it will stay high, the reduction in
20 average use per customer, because of the high natural
21 gas prices compared to prior years. The AGA has done
22 other studies on price elasticity, and as the price
23 of gas goes up, it is expected that customers will
24 continue to dial down, so my expectation is AUPEC, or

1 average use per customer, will continue to decline
2 into the future.

3 Q. You referenced 141 dekatherms. That
4 would be roughly 141 Mcf, right?

5 A. That's right.

6 Q. And approximately what year was that?

7 A. It was 1981, I believe.

8 Q. So from 1981 to approximately 2008 which
9 would be a 27-year period?

10 A. Yes.

11 Q. The consumption decreased from 171 DCM to
12 somewhere in the 80s, correct?

13 A. Correct.

14 Q. If you project from 2008 27 years to
15 2035, you would anticipate seeing the consumption to
16 go from in the 80s down into the 20s?

17 A. I wouldn't necessarily project the same
18 reduction as has occurred to date. I would though,
19 as I said, continue to believe that there will be a
20 reduction in average use per customer over time.

21 Q. And the reason that the reductions going
22 forward are going to be less than what you have
23 experienced in the past is once you insulate a home,
24 you've probably done the majority of what you can do

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16	7a - Supplemental Testimony of Kerry A. Heid		V-I 12 20
17			
18	9 - Direct Testimony of Jerrold L. Ulrey		V-I 12 105
19			
20	9a - Supplemental Testimony of Jerrold L. Ulrey		V-I 12 105
21		- - -	
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24			

1 Friday Morning Session,

2 August 22, 2008

3 - - -

4 ATTORNEY EXAMINER: Let's go on the
5 record. Good morning. The Public Utilities
6 Commission has set for hearing at this time and this
7 place Case No. 07-1080-GA-AIR, In the Matter of the
8 Application of Vectren Energy Delivery of Ohio, Inc.,
9 for Authority to Amend Its Filed Tariffs to Increase
10 the Rates and Charges for Gas Services and Related
11 Matters.

12 My name is Gregory Price. I am the
13 Attorney Examiner assigned to preside over the
14 hearing today. Let's begin by taking abbreviated
15 appearances by the parties so we know who is in the
16 room today. The company.

17 MS. HUMMEL: Thank you. Sam C. Randazzo,
18 Gretchen J. Hummel, and Joseph M. Clark, and Lawrence
19 K. Friedeman on behalf of the company.

20 ATTORNEY EXAMINER: Thank you.

21 Mr. Airey.

22 MR. AIREY: Thank you, your Honor.

23 Jonathan Airey from Vorys, and I think I will be
24 joined by Greg Russell at some point on behalf of

1 Q. To the extent that density of customers
2 per square mile differs, is that a factor that would
3 affect cost per serving customers?

4 A. There are so many variables associated
5 with that. It's not only the length of mains
6 associated with density but also the cost to install
7 mains in more dense areas. Our rates do not
8 differentiate based on geography so.

9 ATTORNEY EXAMINER: Are you saying there
10 are some variables that are increased when density
11 goes up and some variables that are decreased when
12 density goes up?

13 THE WITNESS: Your Honor, that's my
14 understanding. The best witness to address that is
15 Mr. Overcast. He testifies on the costs to serve
16 customers and I think would be best equipped to
17 respond to those type questions.

18 ATTORNEY EXAMINER: Thank you.

19 MR. SERIO: I guess it doesn't pay to be
20 cleanup.

21 Q. The company has a certain number of low
22 use customers on the system today. I believe in
23 deposition you estimated there were approximately
24 8,000 bills that were customers that might

1 discontinue gas service altogether because of the
2 change in how the rate design is going to flow to
3 them on -- in their bills. Do you recall that?

4 A. Yes, I do. And I have some better
5 numbers associated with that. I had stated 8,000
6 bills, but, in fact, it was actually 3,000 customers
7 in total, perhaps 3,200 both residential and general.
8 That's more like 37,000 bills. It represented all
9 customers with usage less than 60 Ccf per year, in
10 other words, half an Mcf per month or no usage
11 whatsoever.

12 Q. And so your assumption is for those low
13 usage customers below 60, they are using gas for
14 reasons other than heating?

15 A. Most assuredly they would not be using
16 that for space heating.

17 ATTORNEY EXAMINER: Are they using --
18 would usage that low -- I am afraid to ask the
19 question, it will reveal my lack of knowledge, but
20 here goes, when you say that low, would it indicate
21 people using it for heating hot water or not heating
22 hot water?

23 THE WITNESS: It could be hot water. It
24 could be a gas stove. It could be --

1 ATTORNEY EXAMINER: Fire pits?

2 THE WITNESS: A fire pit, maybe a gas
3 log, but certainly it wouldn't be more than one of
4 those. It's just very, very low usage.

5 ATTORNEY EXAMINER: But it could be a hot
6 water tank.

7 THE WITNESS: It could be a hot water
8 tank. Those usually, I believe, use more than that
9 per month, but it could be a very small usage, I
10 mean, very small hot water tank.

11 Q. (By Mr. Serio) And you indicate it was
12 37,000 billing units?

13 A. That's the total number of bills.

14 Q. On an annual basis.

15 A. It's 12 times the 3,200 or so.

16 Q. So if all those customers decided to quit
17 taking gas, the lost revenues to the company would be
18 \$7 customer charge times that 37,000 number, correct?

19 A. Part of that was general service
20 customers, and that's \$10, so I believe the total --
21 and we made a pro forma adjustment to indicate these
22 customers would not be on the system reacting to a
23 full price -- a partial full price, and that totaled
24 about \$300,000. It included the customer charge as

1 well as the small amount of base rate revenue
2 recovered through the volumetric charges.

3 ATTORNEY EXAMINER: And that pro forma
4 adjustment is in your schedules?

5 THE WITNESS: It is reflected in our
6 schedules. I don't know that it's separately
7 identified but --

8 ATTORNEY EXAMINER: It's reflected in
9 your schedules?

10 THE WITNESS: It is.

11 Q. Your pro forma adjustment showing that is
12 after the test year, correct?

13 A. That's correct.

14 Q. So if those customers leave the system,
15 there is no impact on customers in this rate
16 proceeding, but it would happen in the next rate
17 case, correct?

18 MS. HUMMEL: Your Honor, could we go off
19 the record for a minute?

20 ATTORNEY EXAMINER: Yes.

21 (Discussion off the record.)

22 ATTORNEY EXAMINER: Let's take 5 minutes.

23 (Recess taken.)

24 ATTORNEY EXAMINER: Let's go back on the

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Citation: 2003 Ohio PUC LEXIS 62, *9-*10

2003 Ohio PUC LEXIS 62, *

In the Matter of the Commission's Investigation Into the Modification of Intrastate Access Charges.

Case No. 00-127-TP-COI

PUBLIC UTILITIES COMMISSION OF OHIO

2003 Ohio PUC LEXIS 62

February 20, 2003, Entered

CORE TERMS: reduction, mirroring, intrastate, access charge, interstate, renewed motion, untimely, assignments of error, ratemaking, expedited, earning, contra, unreasonably, pendency, offset, tariff, avail, four-factor, assignment of error, collateral attack, rate of return, amend, confiscatory, calculations, memorandum, revised, deprive, resume, unjust, caps

PANEL: [*1] Alan R. Schriber, Chairman; Ronda Hartman Fergus; Judith A. Jones; Donald L. Mason; Clarence D. Rogers, Jr.

OPINION: ENTRY ON REHEARING

The Commission finds:

(1) On June 27, 2002, after careful consideration of a Motion to Amend and Supplement Access Recovery Charge or, in the Alternative, Motion for Stay, filed by Verizon North Inc. (Verizon) as well as the memoranda contra filed by the Ohio Consumer's Counsel (OCC) and the joint filing by AT&T Communications of Ohio, Inc., TCG Ohio, and WorldCom, Inc. (IXCs), the Commission issued an entry denying the substance of Verizon's motion and ordering Verizon to continue mirroring interstate charges on an intrastate basis. Recognizing the utility of the settled results from similar issues in the past, the Commission granted Verizon's request for a stay of the ordered reductions for a six-month period, until January 2, 2003, as a means to encourage another settled result of the issues. To further this effort, the Commission directed Verizon to file updated information and detailed supporting documentation for the company's revised earnings calculations. The Commission stated that, if the company believes that an increase to the access recovery [*2] charge (ARC) is still necessary after reviewing the revised earning calculations, Verizon should meet with the various interested parties (Staff, OCC, and the IXCs) to discuss issues associated with the reductions and Verizon's proposal to increase the ARC. By the same entry, Verizon was ordered to resume mirroring of the interstate charges consistent with the Commission's previous access decisions in this proceeding, the policy dating back to Case No. 83-464-TP-COI, and to file the necessary tariffs or documentation to ensure the ordered mirroring on January 2, 2003. The Commission set up a process for the parties to achieve a settled result, but let the parties know that, absent a Commission entry otherwise, the mirroring would absolutely take affect on January 2, 2003.

(2) On December 3, 2002, Verizon filed a Renewed Motion to Alter Access Recovery Charge or, in the Alternative, Motion for Stay and Hearing. Among other things, Verizon's motion requests that the Commission grant an extension to the existing access charge reduction stay beyond January 2, 2003, in order to allow the Commission time to hear, examine, and rectify the alleged annual revenue reduction that would result [*3] from mirroring the interstate access charge reductions on an intrastate basis without also implementing a

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corresponding increase to the ARC. Verizon asserts that the impact on an intrastate basis results in a 7.69 percent intrastate regulated rate of return. The motion further requests that Verizon be directed to file tariffs appropriate to such stay. Verizon maintains that, should the Commission reject its proposed amendment to the ARC, the additional mirrored reduction would be unlawful and would reduce Verizon's rate of return to a per se confiscatory level.

(3) On January 23, 2003, the Commission issued an entry denying Verizon renewed motion filed on December 3, 2002. In denying Verizon's renewed motion, the Commission found that Verizon's original request to alter the access recovery charge was fully considered and rejected in our June 27, 2002, decision in this docket. As a result, Verizon's December 3, 2002, renewed motion constituted an untimely challenge of the June 27, 2002 decision. The Commission further found in the January 23, 2003, entry that, as a result of an earlier stipulation approved by the Commission on July 19, 2001, in this matter, Verizon had been made [*4] whole for the incremental impact of mirroring the Coalition for Affordable Local and Long Distance Services' (CALLS') proposal in Ohio beyond the Commission's longstanding policy of mirroring traffic-sensitive interstate access charges on an intrastate basis. The Commission concluded by stating that, should Verizon believe that its earnings are deficient, the more appropriate remedy is to file a traditional rate case or propose an alternative regulation plan.

(4) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for an application for rehearing with respect to any matters determined by filing an application within 30 days after the entry of the order upon the journal of the Commission.

(5) On February 3, 2003, Verizon filed an application for rehearing of the Commission's January 23, 2003 entry and, simultaneously, a motion for stay and request for expedited ruling. In its application for rehearing, Verizon maintains that the January 23, 2003, entry is arbitrary, unreasonable, unconstitutional, and an abuse of discretion for the following reasons:

(a) The January 23, 2003, entry arbitrarily and unreasonably [*5] directs revenue reductions without directing simultaneous revenue offsets, resulting in confiscation without due process of law.

(b) The January 23, 2003, entry engages in single-issue ratemaking, contrary to the Ohio Revised Code.

(c) The January 23, 2003, entry improperly and unreasonably finds that Verizon's renewed motion filed December 3, 2002, was an untimely request for rehearing.

(d) The January 23, 2003, entry is arbitrary and unreasonable because it does not mirror all changes to interstate access charges directed by the CALLS order on a permanent basis despite precedent to the contrary.

(e) The January 23, 2003, entry is contrary to the Commission's own precedent with respect to mirroring federal access charges.

In support of its motion for stay pending rehearing and appeal, Verizon submits that with each passing day the company losses approximately \$ 27,000 and that the company is unable to recover retroactively those lost revenues. Consequently, according to Verizon, it would be unjust and unlawful to deprive the company of those revenues during the pendency of this review. Further, for these same reasons, Verizon submits that an expedited ruling on its motion [*6] is warranted pursuant to Rule 4901:1-1-12(C), Ohio Administrative Code.

(6) Memoranda contra Verizon's application for rehearing were filed by AT&T

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Communications of Ohio, Inc. and TCG Ohio (jointly AT&T) on February 13, 2003, and by the OCC on February 18, 2003. In its memorandum contra, AT&T submits that Verizon has raised no new argument not already considered by the Commission on at least three previous occasions. Further, AT&T claims that Verizon's most recent application for rehearing is nothing more than an untimely collateral attack on the June 27, 2002, entry and must be dismissed.

In its memorandum contra Verizon's application for rehearing, the OCC asserts that Verizon has failed to show that the access charge rates resulting from the January 23, 2003, entry are confiscatory and, in any event, Verizon has failed to take advantage of the ratemaking options available to the company should Verizon believe that the current earnings are below a reasonable level for whatever reason, including reduction of access charges.

(7) Verizon's application for rehearing filed on February 3, 2003, is denied in its entirety. Initially, we note that four of the five grounds for rehearing [*7] outlined in Verizon's February 3, 2003, application for rehearing have been addressed previously by the Commission. Importantly, after reviewing hundreds of pages of documents filed in two rounds of comments, including comments from Verizon, the Commission, on January 11, 2001, issued an opinion and order adopting the rate caps and rate reductions of the CALLS plan on an intrastate basis for the four largest incumbent local exchange carriers in Ohio including Verizon. On February 12, 2001, Verizon filed an application for rehearing of the Commission's January 11, 2001 order. The Commission denied Verizon's assignments of error in its entry on rehearing issued March 15, 2001. Thereafter, Verizon again filed for rehearing of the March 15, 2001 entry on rehearing and again the Commission denied Verizon's application for rehearing in an entry on rehearing issued May 5, 2001.

Having previously addressed Verizon's arguments contained in its first, second, fourth, and five assignments of error on at least two prior occasions in this docket, the Commission need not further address those arguments at this time. The Commission notes that Verizon had a procedure available to it in order to [*8] challenge the Commission's adoption of the CALLS' rate caps and rate reductions and Verizon failed to avail itself of that procedure. The four assignments of error listed above are nothing more than a collateral attack on those prior decisions. Accordingly, the Commission will not further address those assignments of error.

(8) Verizon's final assignment of error is that the January 23, 2003, entry improperly and unreasonably finds that Verizon's December 3, 2002, motion was an untimely request for rehearing. Verizon continues that the company had no reason to seek rehearing of the June 27, 2002, entry insofar as the entry did not adversely impact Verizon.

Rehearing on this assignment of error is likewise denied. The Commission very clearly indicated in the June 27, 2002, entry that we gave no credence to Verizon's arguments seeking to amend and supplement the access recovery charge. It is equally clear in the June 27, 2002, entry at page three that "unless otherwise ordered, on January 2, 2003, the company (Verizon) shall be required to resume the mirroring of interstate charges on an intrastate basis...." There is no question that the very same reductions of Verizon's intrastate [*9] access charges ordered by the June 27, 2002 entry are the subject of Verizon's current challenge. Verizon apparently confuses the Commission's willingness to afford the company time to avail itself of the settlement opportunity or ratemaking remedies available to it. But that confusion is disingenuous, given that Verizon previously effectuated the access charge reductions ordered by the June 27 entry through a June 28, 2002 tariff filing. The time to seek rehearing or clarification of the Commission's June 27, 2002, entry has run. Accordingly, the arguments made in Verizon's February 3, 2003, application for rehearing must be denied.

(9) Concurrent with the filing of its application for rehearing, Verizon filed a motion for stay of the January 2, 2003, rate reductions as well as a request for an expedited ruling. As noted above, Verizon's sole argument offered in support of a stay is that it would be unjust and unlawful to deprive Verizon of the revenues accruing during the pendency of review of the January 23, 2003 entry.

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Verizon's request for a stay of the January 2, 2003, rate reductions during the pendency of the appeal of this matter is denied. There is no controlling precedent [*10] in Ohio setting forth the conditions under which the Commission will stay one of our own orders. Yet the Commission has urged the adoption of a four-factor test governing a stay that was strongly supported in a dissenting opinion by Justice Douglas in MCI Telecommunications Corp. v. Pub. Util. Comm. (1987), 31 Ohio St.3d 604. This four-factor test has been deemed appropriate by courts when determining whether to stay an administrative order pending judicial review. This test includes and examination of:

- (a) Whether there has been a strong showing that movant is likely to prevail on the merits;
- (b) Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;
- (c) Whether the stay would cause substantial harm to other parties; and
- (d) Where lies the public interest.

Verizon's motion for stay does not even address these factors let alone prevail on them. Moreover, as previously noted, Verizon does have ratemaking options available to it if the company believes that it has just and reasonable grounds for a rate increase to offset the alleged access charge revenue loss.

Verizon has not met the recognized [*11] test for a stay of the Commission's decision and has elected not to avail itself of the options available to offset alleged access charge revenue losses. Accordingly, the Commission denies the motion for a stay.

It is, therefore,

ORDERED, That the application for rehearing filed by Verizon North Inc. on February 3, 2003, is denied as discussed herein. It is, further,

ORDERED, That the motion for stay and request for expedited ruling filed on February 3, 2003, is denied as discussed herein. It is, further,

ORDERED, That a copy of this Entry be served upon all parties of record to this proceeding.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Ronda Hartman Fergus

Judith A. Jones

Donald L. Mason

Clarence D. Rogers, Jr.

CASE NUMBER: 00-0127-TP-COI

CASE DESCRIPTION: MODIFICATION OF INTRASTRATE ACCESS

DOCUMENT SIGNED ON: 2/20/2003

DATE OF SERVICE: 2/20/03

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PARTIES OF RECORD

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Citation: 2007 Ohio PUC LEXIS 575

2007 Ohio PUC LEXIS 575, *

In the Matter of the Petition of MCI Metro Access Transmission Services LLC dba Verizon Access Transmission Services, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with United Telephone Company of Ohio dba Embarq

Case No. 06-1485-TP-ARB

PUBLIC UTILITIES COMMISSION OF OHIO

2007 Ohio PUC LEXIS 575

August 24, 2007, Entered

CORE TERMS: examiner, final version, memorandum, conduct business, negotiation, observes, contra, interconnection, expedited

OPINIONBY: [*1] LYNN

OPINION: ENTRY

The Attorney Examiner finds:

(1) On August 20, 2007, MCI Metro Access Transmission Services LLC dba Verizon Access Transmission Services, Inc. (Verizon) filed a motion for stay and request for expedited consideration (Motion for Stay) of the Commission's July 25, 2007, Order on Rehearing (Commission Order) in this matter. The Commission Order concerns the terms of an interconnection agreement (ICA) between Verizon and United Telephone Company of Ohio dba Embarq (Embarq). Also on August 20, 2007, Verizon filed a memorandum (Verizon Memorandum) in support of its Motion for Stay.

The Commission Order had concluded that compensation for virtual NXX (vNXX) traffic under the ICA should be addressed by incorporating into Section 55.4 of the ICA the language proposed by Embarq on May 2, 2007. The Commission Order had also directed the parties to file the final version of the ICA, including language for Section 55.4, by August 25, 2007. Verizon's Motion for Stay argues that the Commission Order "erred in several material respects, not the least of which was its decision to modify the Award sua sponte." Therefore, concludes Verizon, a stay of the Commission Order to file [*2] the ICA is necessary. Because of the impending August 25, 2007, deadline for filing the final ICA, Verizon adds that it is also requesting an expedited ruling on its Motion for Stay. n1

(2) On August 23, 2007, Embarq filed a reply (Embarq Reply) to Verizon's Motion for Stay. In Embarq's opinion, given that the Commission issued an Arbitration Award in this case on April 18, 2007, and subsequently issued the Commission Order on July 25, 2007, Verizon is effectively asking the Commission to consider its decision regarding vNXX for a third time. Embarq believes that the vNXX issue has already been argued, considered, and decided by the Commission. Further, asserts Embarq, Verizon's pleadings do not contain any new arguments or evidence that would result in a different decision by the Commission.

Embarq adds that the Supreme Court of Ohio has determined that Section 4903.16, Revised Code, applies to all efforts to stay final Commission orders. Under this Revised Code section, Embarq points out, "an undertaking," such as the posting of a bond, is a condition for granting a stay. Noting the "substantial dollars that are at risk" for Embarq if

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[*3] there is delay in implementing the ICA, Embarq urges the Commission to require Verizon to post a bond if a stay is granted.

(3) The attorney examiner observes that the Commission Order had directed the parties to file the final version of the ICA by August 25, 2007 and that the Commission has not yet issued a decision regarding Verizon's Application for Rehearing. The attorney examiner further observes that Embarq has not, but presumably will, file a memorandum contra Verizon's Application for Rehearing. Finally, while cognizant of Embarq's financial concerns if implementation of the ICA currently under negotiation is delayed, the attorney examiner notes that the parties are still able to conduct business under terms of a previously negotiated ICA. n2 Given that Embarq's arguments in an anticipated memorandum contra are unknown, as is the Commission's decision concerning the outcome of Verizon's Application for Rehearing, and presuming that the parties continue to conduct business under a prior ICA, the attorney examiner concludes that it is appropriate to grant Verizon's Motion for Stay until the Commission orders otherwise.

----- Footnotes -----

n1 Verizon's Motion for Stay also refers to Verizon's Application for Rehearing, which was filed on August 20, 2007. In the Application for Rehearing, Verizon argues that Embarq's June 29, 2007, Motion for Clarification and Application for Rehearing was not filed within the 30-day period allowed by Section 4903.10, Revised Code, for such a filing. Verizon also argues that, alternatively, the Commission Order was arbitrary and capricious because it rejected Verizon's proposed ICA language that the Commission had previously found appropriate in the Commission Order. **[*4]**

n2 The petition for arbitration filed on December 19, 2006, states that the parties had operated under an interconnection agreement effective April 1, 2004, through July 31, 2005, and that the parties subsequently agreed to a stipulated starting date for negotiations of July 12, 2006. Presumably, the parties have continued to operate under terms of the prior agreement while terms of the subsequent agreement are being resolved.

----- End Footnotes-----

It is, therefore,

ORDERED, That the parties not file a final version of the ICA until further directed by the Commission to do so. It is, further,

ORDERED, That a copy of this entry be served upon Verizon and its counsel, Embarq and its counsel, and all interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

James M. Lynn

Attorney Examiner

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1995 Ohio App. LEXIS 5825, *

STATE OF OHIO, Plaintiff-Appellant Cross-Appellee v. S-PIQ KRISTEN K. **SANDERS**, Defendant-Appellee Cross-Appellant

C.A. CASE NO. 95 CA 11, 95 CA 12

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, MIAMI COUNTY

1995 Ohio App. LEXIS 5825

September 29, 1995, Rendered**NOTICE:**

[*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: T.C. CASE NO.94-TR-C-3104.**DISPOSITION:** Reversed and remanded.**CASE SUMMARY****PROCEDURAL POSTURE:** Appellant state government sought reversal of the judgment of the Court of Common Pleas of Miami County (Ohio) declaring that the mandatory sentencing provisions of Ohio Rev. Code § 4511.19 were unconstitutional.**OVERVIEW:** Appellee drunk driver pled no contest to new drunk driving charges. As a recidivist offender, she was subject to a mandatory term of confinement, license suspension, and immobilization of the vehicle she drove. She filed a motion to declare the mandatory sentencing statute unconstitutional, and the court granted that motion, striking the law. Appellant state government took an appeal. The court reversed all but one small portion of the trial judge's order, and remanded the case for resentencing. In so ruling, it rejected, one-by-one, appellee's claims that the mandatory sentencing statute violated due process, equal protection, the prohibition on ex post facto laws, the prohibition on cruel punishments, the prohibition on excessive fines, and the separation of powers doctrine. In some instances, the court held that appellee lacked standing to challenge certain provisions of the mandatory sentencing statute since they were inapplicable to her (she not having reached the number of prior convictions triggering those provisions). The only part of the trial judge's order that was upheld was the complete bar on judicial stays of administratively-issued license suspension orders.**OUTCOME:** The judgment was reversed, and the case was remanded for resentencing. The mandatory sentencing provisions of Ohio Rev. Code § 4511.19 did not violate any provision of the state or federal constitutions, save one minor flaw.**CORE TERMS:** offender, assignments of error, impoundment, sentence, suspension, driver, license

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suspension, forfeiture, excessive fines, separation of powers, mandatory, classification, convicted, judicial power, fine, motor vehicle, administrative suspension, incarceration, license, arrest, ex post facto law, erroneous deprivation, alcohol, seizure, prompt, driving privileges, sentencing provisions, reasons stated, enhancement, felony

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HN1 * Crimes are statutory, as are the penalties for them, and the only sentence which a trial court may impose is one provided by statute. A court has no power to substitute a different sentence for that provided by law. An attempt to disregard statutory requirements when imposing a sentence renders the sentence a nullity or void. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN2 * [Ohio Rev. Code § 4507.16\(B\)\(3\)](#) requires the trial courts to suspend for not less than one year nor more than 10 years the operator's license of any drunk-driving offender who has had two drunk driving violations within the preceding five years. Other provisions in the statute require greater or lesser periods of suspension, depending on the offender's record. [More Like This Headnote](#)

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HN3 * [Ohio Rev. Code §§ 4511.99\(A\)\(4\)](#) and [4511.193\(B\)\(2\)\(b\)](#) require trial courts to impound the automobiles driven by drunk driving offenders who have had two drunk driving violations within the preceding five years. [More Like This Headnote](#)

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HN4 * Unless a statutory scheme involves a suspect classification or a fundamental right, it survives an equal protection analysis when it bears a rational relationship to a legitimate governmental purpose. Unless the statute is wholly irrelevant to achievement of that purpose, it must be upheld. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN5 * Operation of a motor vehicle is a privilege, not a right. It is no doubt an important privilege, and cannot be denied without due process of law. However, it is not a fundamental right subject to the requirements of the Equal Protection clause. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN6 * The classifications created by the drunk driving penalty statutes present no constitutionally suspect differences. [More Like This Headnote](#)

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HN7 * Whether a statute is rationally related to a legitimate governmental purpose depends on whether its goal is a legitimate one for government to seek and whether the means employed are rationally related to the goal involved. The rational basis test requires only that the statute's means be rationally related to its goal, not that the means employed must

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be the best way of achieving that goal. [More Like This Headnote](#)

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HN8 [Ohio Rev. Code § 4511.191](#) provides that if a person who has been arrested for drunk driving refuses to submit to a chemical test of his or her blood, breath, or urine for its alcohol or drug content, and that if a person who submits to the test is shown to have a blood-alcohol level in a prohibited amount, the arresting officer shall serve a notice on the offender advising that his or her driving privileges are suspended immediately. [More Like This Headnote](#)

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HN9 [Ohio Rev. Code § 4511.191](#) provides that the license suspension of a drunk driving arrestee who has refused to take a chemical test will last until his or her initial appearance on the charge, which will be held within five days, and that the offender may appeal the suspension at the initial appearance. However, [§ 4511.191\(H\)\(1\)](#) provides that an appeal does not stay the operation of the suspension, and no court has jurisdiction to grant a stay of a suspension. If the offender appeals the suspension, the hearing may be continued upon the motion of the offender, the prosecuting attorney, or the court. No limit is put on the continuance. The offender may obtain relief from the suspension if he shows, by a preponderance of the evidence, either that the arresting officer lacked probable cause to believe that a violation had occurred, or that the officer did not request the test or did not inform the arrestee of the consequences of taking it or not taking it, or that the officer did not request the test or that the offender did not fail to pass it. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN10 Driving privileges are constitutionally protected property interests and their deprivation or suspension by the government implicates the Due Process clause. Whether procedural due process requires a hearing prior to the action being taken is a determination subject to a test balancing three factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN11 Due process of law implies, in its most comprehensive sense, the right of the person affected thereby to be present before the tribunal which pronounces judgment upon a question of life, liberty or property, to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN12 The administrative suspension provisions of [Ohio Rev. Code § 4511.191](#) are not lacking in due process merely because they fail to provide for prior judicial review. Neither are they constitutionally infirm because they permit an indefinite continuance of post-deprivation reviews. It cannot be assumed that the courts will allow that to

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happen. [More Like This Headnote](#)

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 HN13 [Ohio Rev. Code § 4511.191](#) is lacking in due process because, in view of the very real potential for continuances in busy municipal courts, coupled with the allied prohibition against occupational privilege exceptions in [Ohio Rev. Code § 4507.16](#), the absolute prohibition against stays of execution of the suspension pending a resolution of an appeal is an intolerable burden on the private interests of any driver who has been subject to an erroneous deprivation. It subjects him or her to an attenuated deprivation of a constitutionally protected property interest without a reasonable opportunity for relief. It also permits the state to seek and obtain a continuance, without limitation, that may impair a driver's capacity to bear the burden of proof imposed on him or her by the statute for reversal of the suspension. This denial of due process results from an unconstitutional exercise of the judicial power by the General Assembly, which has exercised the judicial power by prohibiting judicial stays of administrative suspensions in violation of the principle of separation of powers. [More Like This Headnote](#)

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HN14 [When unconstitutional features of a statute may be severed from its otherwise constitutional provisions, courts should sever those unconstitutional provisions to give effect to the remainder of the statute.](#) [More Like This Headnote](#)

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 HN15 [The provisions of Ohio Rev. Code § 4511.191\(H\) which prohibit or preclude a court from staying execution of an administrative suspension during the pendency of an appeal to the court are unconstitutional. Consequently, the courts are not bound by those provisions of the statute.](#) [More Like This Headnote](#)

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 HN16 [Ohio Rev. Code § 4511.195](#) requires that an arresting officer seize and impound the vehicle driven by a person arrested for a drunk driving violation who has had at least one prior conviction in the past five years. The officer must also seize the license plates from the vehicle. The driver, or an innocent owner, can seek a return of the vehicle and its plates at the offender's initial appearance. The seizure provision does not apply to rental vehicles. The court is not prohibited from returning a driver's vehicle or its plates, but if the court does the driver must promise to make the vehicle available at the end of the case if temporary impoundment or forfeiture is then ordered by the court. [More Like This Headnote](#)

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 HN17 [Seizure without notice and an opportunity to be heard does not constitute a due process violation where the government has an important interest at stake, there is a need for prompt attention, the summary procedure is carried out by law enforcement officers under a narrowly drawn statute, and affected persons are afforded an opportunity to be heard after the seizure.](#) [More Like This Headnote](#)

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HN18 [Ohio Rev. Code § 4511.99\(A\)\(3\)](#) requires a sentencing court to sentence a person who is convicted of a third drunk driving offense within five years to a definite term of imprisonment of at least 30 consecutive days and no more than one year. In the

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alternative, the court may sentence the offender to 15 days imprisonment and a term of electronically-monitored house arrest of from 15 days to one year. The minimum term of imprisonment required under the statute may not be suspended, and during the term the offender is not eligible for work release. [More Like This Headnote](#)

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HN19 * A penalty violates the cruel and unusual punishment clause of U.S. Const. amend. VIII and Ohio Const. art. I § 10 if it is shocking to the community's sense of justice, barbaric, or grossly disproportionate to the criminal offense for which it is imposed. The test for disproportionality looks to the gravity of the offense, the sentence imposed for other crimes in the same jurisdiction, and the sentence imposed for the same crime in other jurisdictions. [More Like This Headnote](#)

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HN20 * The punishments required by Ohio Rev. Code § 4511.99(A) are not so disproportionate to the offense involved to present a violation of U.S. Const. amend. VIII. [More Like This Headnote](#)

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HN21 * A criminal defendant lacks standing to argue the unconstitutionality of statutory provisions that do not apply to her case. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN22 * The Ohio Constitution organizes the government of the state into three co-ordinate branches and authorizes each to act in the ways provided. In contrast to the Executive and Judicial branches, to which powers are affirmatively granted by the Constitution, the General Assembly is not granted powers by the Constitution, which only provides limitations on the powers that the General Assembly may exercise. Therefore, the General Assembly may pass any law unless it is specifically prohibited by the state or federal Constitutions or prohibited by a necessary and obvious implication they present. [More Like This Headnote](#)

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HN23 * Ohio Const. art. IV § 1 vests the judicial power of the state in its courts. Under the separation of powers doctrine, exercise of the judicial powers is confined to the courts. Therefore, the General Assembly may not exercise judicial powers. An act of the General Assembly that assumes to control or exercise judicial power is unconstitutional. Further, any such act constitutes a denial of due process of law. [More Like This Headnote](#)

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HN24 * Legislative bodies have the authority to set minimum penalties for criminal offenses. [More Like This Headnote](#)

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HN25 * The Ohio General Assembly has the plenary power to prescribe crimes and fix penalties. Laws providing for definite sentences and law providing the courts with discretion in setting

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the penalty within well-defined limits have both been upheld as within the power of the General Assembly to enact. [More Like This Headnote](#)

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HN26 The absolute prohibition of judicial stays of administrative license suspensions in [Ohio Rev. Code § 4511.191](#) violates the separation of powers principle of the Ohio Constitution. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN27 A court, once having obtained jurisdiction of a cause of action, has, as an incidental to its constitutional grant of power, inherent power to do all things reasonably necessary to the administration of justice in the case before it. In the exercise of this power, a court, when necessary in order to protect or preserve the subject matter of the litigation, to protect its jurisdiction and to make its judgment effective, may grant or issue a temporary injunction in aid of or ancillary to principal action. The control over this inherent judicial power, in this particular instance the injunction, is exclusively within the constitutional realm of the courts. As such, it is not within the purview of the legislature to grant or deny the power nor is it within the purview of the legislature to shape or fashion circumstances under which this inherently judicial power may be or may not be granted or denied. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN28 Impoundment imposes a temporary loss, rather than a permanent loss, and the government realizes no monetary benefit. However, the crucial question is whether the requirement imposes a monetary punishment. If it does, [U.S. Const. amend. VIII](#) applies, notwithstanding the fact that the requirement also has a remedial purpose. [More Like This Headnote](#)

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HN29 The impoundment required by [Ohio Rev. Code § 4511.99\(A\)\(3\)\(b\)](#) is a fine for purposes of [U.S. Const. amend. VIII](#). [More Like This Headnote](#)

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[Criminal Law & Procedure](#) > [Sentencing](#) > [Excessive Fines](#)

HN30 The Excessive Fines clause of [U.S. Const. amend. VIII](#) applies to federal actions. It has not been applied to fines imposed by the states. [More Like This Headnote](#)

[Constitutional Law](#) > [Bill of Rights](#) > [Fundamental Rights](#) > [Criminal Process](#) > [Cruel & Unusual Punishment](#)

[Criminal Law & Procedure](#) > [Sentencing](#) > [Excessive Fines](#)

HN31 An excessive fines clause is contained in [Ohio Const. art. I § 9](#). [More Like This Headnote](#)

[Constitutional Law](#) > [Bill of Rights](#) > [Fundamental Rights](#) > [Criminal Process](#) > [Cruel & Unusual Punishment](#)

[Criminal Law & Procedure](#) > [Sentencing](#) > [Excessive Fines](#)

[Criminal Law & Procedure](#) > [Sentencing](#) > [Proportionality](#)

HN32 A fine is excessive for constitutional purposes if its value in relation to the offense committed is grossly disproportionate. [More Like This Headnote](#)

[Constitutional Law](#) > [Congressional Duties & Powers](#) > [Ex Post Facto Clause & Bills of Attainder](#) > [Ex Post Facto Clause](#) >

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[Return of Punishment](#)

[Constitutional Law](#) > [State Constitutional Operation](#)

HN33 * A law that provides for the infliction of punishment on a person for an act which, when it was committed, was innocent, or that aggravates a crime or makes it greater than when it was committed, or that changes the punishment or inflicts a greater punishment than was provided when a crime was committed, is an ex post facto law. U.S. Const. art. I § 10 forbids the passage of ex post facto laws by the states. The same is prohibited by [Ohio Const. art. II § 28](#). [More Like This Headnote](#)

[Constitutional Law](#) > [Congressional Duties & Powers](#) > [Ex Post Facto Clause & Bills of Attainder](#) > [General Overview](#)
[Criminal Law & Procedure](#) > [Sentencing](#) > [Guidelines](#) > [Adjustments & Enhancements](#) > [Criminal History](#) >

[Prior Felonies](#)

[Criminal Law & Procedure](#) > [Sentencing](#) > [Guidelines](#) > [Adjustments & Enhancements](#) > [Criminal History](#) >

[Prior Misdemeanors](#)

HN34 * Statutes which enhance the penalty for repeat offenders based in part upon criminal conduct occurring prior to passage of the enhancement provision do not constitute ex post facto legislation. The enhancement provisions do not punish the past conduct; rather, the enhancement provisions merely increase the severity of a penalty imposed for criminal behavior that occurs after passage of the enhancement legislation. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Constitutional Law](#) > [Congressional Duties & Powers](#) > [Ex Post Facto Clause & Bills of Attainder](#) > [General Overview](#)
[Criminal Law & Procedure](#) > [Criminal Offenses](#) > [Vehicular Crimes](#) > [Driving Under the Influence](#) > [General Overview](#)
[Criminal Law & Procedure](#) > [Sentencing](#) > [Guidelines](#) > [Adjustments & Enhancements](#) > [Criminal History](#) >

[Prior Misdemeanors](#)

HN35 * [Ohio Rev. Code § 4511.99\(A\)](#) does not impose a punishment on a drunk driving offender for her past convictions. It merely increases the severity of the punishment imposed for her current offense because of those past convictions. It is not an ex post facto law. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Constitutional Law](#) > [Equal Protection](#) > [Scope of Protection](#)

[Criminal Law & Procedure](#) > [Sentencing](#) > [Proportionality](#)

HN36 * The Equal Protection clause does not prohibit disproportionate treatment of different classifications. Rather, it prohibits the creation of different classifications that are constitutionally suspect. Classifying individuals according to whether or not they have committed a particular offense, and then applying different penalties to those offenses, does not offend the Equal Protection Clause because the classifications involved are not constitutionally suspect. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Constitutional Law](#) > [Bill of Rights](#) > [Fundamental Rights](#) > [Criminal Process](#) > [Cruel & Unusual Punishment](#)

[Criminal Law & Procedure](#) > [Sentencing](#) > [Cruel & Unusual Punishment](#)

[Criminal Law & Procedure](#) > [Sentencing](#) > [Excessive Fines](#)

HN37 * The concern of the Excessive Fines clause is limited to monetary punishments. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Governments](#) > [Local Governments](#) > [Duties & Powers](#)

[Governments](#) > [Local Governments](#) > [Home Rule](#)

[Governments](#) > [State & Territorial Governments](#) > [Relations With Governments](#)

HN38 * Exercise of local power over matters guaranteed by the Home Rule Amendments to [Ohio Const. art. XVIII § 7](#) is limited by [Ohio Const. art. XVIII, § 6](#), to local laws and regulations not in conflict with the general laws of Ohio, which includes any law enacted by the state in exercise of its police powers. [More Like This Headnote](#)

[Criminal Law & Procedure](#) > [Criminal Offenses](#) > [Vehicular Crimes](#) > [Driving Under the Influence](#) > [Blood Alcohol & Field Sobriety](#) > [Implied Consent](#) > [Warning Requirements](#)

HN39 * [Ohio Rev. Code § 4511.191\(C\)\(1\)](#) requires a person under arrest for drunk driving to be advised of the consequences of refusal to submit to a chemical test and failure to pass the test to which he or she is asked to submit. The various consequences are those specified in [§ 4511.191\(E\)](#) and [\(F\)](#). [More Like This Headnote](#)

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[Criminal Law & Procedure](#) > [Criminal Offenses](#) > [Vehicular Crimes](#) > [Driving Under the Influence](#) > [Elements](#)

[Criminal Law & Procedure](#) > [Preliminary Proceedings](#) > [Initial Appearances](#) > [Procedure & Scope](#)

HN40 Drunk driving violations are governed by the Ohio Traffic Rules. [Ohio Traf. R. 8](#) provides for an arraignment on a traffic violation charge, which constitutes the initial appearance contemplated by [Ohio Rev. Code § 4511.191](#). The statute requires that event within five days of the arrest. [More Like This Headnote](#)

[Evidence](#) > [Hearsay](#) > [Exceptions](#) > [Business Records](#) > [Admissibility in Criminal Trials](#)

[Evidence](#) > [Hearsay](#) > [Exceptions](#) > [Public Records](#) > [General Overview](#)

HN41 A police officer's report is admissible under [Ohio Evid. R. 803\(8\)](#) as an exception to the rule against hearsay as a record, report, or compilation setting forth matters observed pursuant to a duty imposed by law as to which matters there was a duty to report. The exception in [Ohio Evid. R. 803\(8\)](#) to criminal proceedings does not prevent its application to appeals of administrative suspensions of driver licenses because such appeals are civil in nature, not criminal. [More Like This Headnote](#)

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John Rion, 1630 First National Plaza, Dayton, Ohio 45402, Attorney for Defendant-Appellee, Cross-Appellant.

JUDGES: GRADY, J. WOLFF, J. and FAIN, J., concur.

OPINION BY: GRADY

OPINION

OPINION

GRADY, J.

This opinion consolidates two separate appeals from a sentence imposed in an OMVI case. [95 CA 11](#) is an appeal by the [State of Ohio](#). [95 CA 12](#) is an appeal by Defendant Kristen V. Sanders. Each presents numerous issues concerning the constitutionality of various suspension and penalty provisions of Ohio's OMVI laws enacted by the General Assembly in 1994.

Sanders' conviction was entered on her plea of no contest. **[*2]** Pursuant to [App.R. 9\(C\)](#), the trial court filed the following statement of the evidence and proceedings.

1. On March 18, 1994, the Defendant Appellee, Kristen Sanders was stopped by Officer Alan Dock of the Piqua Police Department and subsequently charged with driving under the influence of alcohol contrary to [Section 4511.19\(A\)\(1\) of the Ohio Revised Code](#). That charge was subsequently filed in Miami County Municipal Court and assigned Case Number 94-TRC-3104-S-PIQ.

2. Since the defendant refused the breathalyzer test and the LEADS printout indicated that she had previously been convicted of DUI on three previous occasions within the 5 years preceding March 18, 1994, the driver's license of Defendant/Appellee Kristen Sanders was administratively suspended pursuant to [Ohio Revised Code Section 4511.191](#). A copy of that suspension and the notice of that suspension was given to Defendant/Appellee Kristen Sanders, and another copy was also filed with the Court and filed in said Case Number 94-TR-C-3104-S-PIQ. A true and correct copy of that administrative license suspension and notice there of is attached hereto as Exhibit "A". It was subsequently determined that Defendant/Appellee **[*3]** Sanders had been convicted of DUI on two,

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rather than three, prior occasions.

3. On March 22, 1994, the defendant plead not guilty and filed a motion requesting the trial court to find R.C. 4511.19 unconstitutional on several grounds. This motion was supplemented by defense counsel on April 4 and 12, 1994. The State opposed the Motion to Dismiss by memorandum filed June 13, 1994.

4. On September 7, 1994, the trial court issued a memorandum decision concerning Defendant/Appellee's motion to dismiss. A true and correct copy of that decision is attached hereto as Exhibit "B".

5. On January 25, 1995 Defendant/Appellee Kristen Sanders entered a plea of no contest and was sentenced. A true and correct copy of that Sentencing Entry is attached hereto as Exhibit "C".

Because Sanders had two prior OMVI convictions, the trial court was required by R.C. 4511.99(A)(3) to sentence Sanders to at least 30 days in jail or 15 days in jail and 55 days of electronically-monitored house arrest, to pay a fine of \$ 500, and to attend an approved alcohol and drug addiction program. The court was also required to order Sanders' vehicle immobilized and its license plates impounded for 180 days.

[*4] Sanders moved to dismiss the charges against her, arguing that the penalty provisions of R.C. 4511.99 applicable to her and the provisions of R.C. 4511.191 which permitted the administrative suspension of her driving privileges are unconstitutional. The trial court addressed those arguments in a decision filed September 7, 1994, stating:

The impaired driver is a menace and must be removed from the highways; however, removal must be accomplished within the framework of the constitution.

I find the subject legislation is unconstitutional on numerous grounds.

The sentencing provisions clearly violate the Eighth Amendment proportionality provisions. There are more than one hundred felonies that do not require any actual incarceration. A person convicted of Manslaughter, Gross Sexual Imposition, Arson and numerous other felonies do not require any actual incarceration. Such mandated sentencing is irrational, capricious, and arbitrary as well as unconstitutional.

The numerous forfeiture provisions and reinstatement fees are in fact additional punishment. This fact is clearly manifested by the legislation that does not require a reinstatement fee for a license that **[*5]** was forfeited due to non-appearance. These additional punishments for the same offense violate the excessive fines prohibition of the United States and Ohio Constitutions. (Austin v. U.S., 1993, 113 S. Ct. 2001).

The provisions for license suspensions violate equal protection clauses of the Ohio and United States Constitution as well as do forfeiture provisions. Suspensions produce grossly unequal burdens depending on where the individual lives. A person who lives close to public transportation suffers far less punishment than does the person who lives in a rural area far from public transportation. A person who has a \$ 20,000 car, paid for, suffers far greater punishment from a forfeiture than does the person who has a \$ 1,000 mortgaged car forfeited. In each scenario, people are denied the equal protection of the Law that our constitution guarantees.

To deny a person the right to operate a motor vehicle without any hearing is a violation of due process and as such is unconstitutional.

Penalty provisions are enhanced by conduct that occurred prior to the enactment of these statutes. Ex post facto legislation is unconstitutional.

The taking of a person's property **[*6]** without a hearing violates the due process clauses of the United States and Ohio Constitutions. Any statute that provides for the taking, impounding or immobilization of a motor vehicle without a hearing is unconstitutional.

The statutory amendments enacted by Amended Sub. S.B. 62 and 275 clearly violate the separation of

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powers. A legislature, eager for re-election has enacted laws that are clear and evident encroachments on the Court's powers. In these bills, the Legislative Branch of the Government is clearly telling the Judicial Branch, "If you don't do what we would like you to do we are going to order you to do it".

These enactments are unconstitutional due to excessive penalties denial of equal protection, denial of due process, Ex post facto legislation, and a violation of the separation of powers.

Since this Legislation is unconstitutional, it failed to repeal or amend the prior legislation so the Court will proceed under the prior statutes.

Defendant's motion to dismiss is overruled since the prior statutes are in effect.

Having found the current statutes unconstitutional in the respects discussed, the trial court proceeded to sentence Sanders under [*7] the former versions of the law to serve a jail term of twelve months, which the court suspended in lieu of five years probation, suspension of her driving privileges for five years, and to pay a fine of \$ 500.

I.

Appeal of Plaintiff State of Ohio

95-CA-11

The State presents five assignments of error, which are addressed below.

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN FAILING TO SENTENCE APPELLEE TO AT LEAST THE MINIMUM MANDATORY PUNISHMENTS PROVIDED FOR BY STATUTE.

HN1 Crimes are statutory, as are the penalties for them, and the only sentence which a trial court may impose is one provided by statute. A court has no power to substitute a different sentence for that provided by law. An attempt to disregard statutory requirements when imposing a sentence renders the sentence a nullity or void. State v. Beasley (1984), 14 Ohio St. 3d 74, 471 N.E.2d 774. Colegrove v. Burns (1964), 175 Ohio St. 437, 195 N.E.2d 811.

The foregoing provisions are subject to an exception if the trial court finds that the sentence required by the General Assembly violates some requirement of the Ohio or Federal Constitutions. The court is then not required to impose [*8] that sentence. Indeed, the court may then not impose that sentence, but neither may it impose a different sentence, as the court did here when it employed the former version of R.C. 4511.99. That version has been repealed. Its repeal is not vitiated by any unconstitutionality of the substitute provisions enacted.

The trial court held R.C. 4511.99 unconstitutional as it applied to Sanders. The reasons for that holding are the subject of the further assignments of error. In our determination of those assignments, we find that the trial court erred when it found R.C. 4511.99 unconstitutional as it applied to Sanders. Therefore, the trial court erred when it failed to sentence Sanders according to the provisions of that statute applicable to her conviction.

The State's first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN HOLDING THAT THE SUSPENSION OF A DRIVER'S LICENSE OR THE IMPOUNDMENT OF A CAR WHEN A PERSON IS ARRESTED FOR OMVI VIOLATES THE EQUAL PROTECTION CLAUSE.

HN2 R.C. 4507.16(B)(3) requires the trial courts to suspend for not less than one year nor more than ten years the operator's license of any OMVI offender who has had [*9] two OMVI violations within the preceding five years, as Sanders has. Other provisions in the statute require greater or lesser periods of suspension, depending on the offender's record.

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HN3 ¶ R.C. 4511.99(A)(4) and R.C. 4511.193(B)(2)(b) require the trial court to impound the automobile driven by an OMVI offender who has had two OMVI violations within the preceding five years, as Sanders had. Sanders was not at risk of forfeiture of her automobile because she did not have three prior OMVI offenses. See, R.C. 4511.99(A) and R.C. 4511.193(B)(2)(c).

The trial court held that these suspension and impoundment requirements are unconstitutional because they impose a greater burden on offenders who lack an alternative means of public transportation. The court also reasoned that forfeiture imposes a greater burden on persons who have paid for their autos than on persons who have financed theirs and lose less equity in the forfeiture.

Sanders was not at risk of forfeiture of her vehicle. Therefore, as to her the constitutionality of forfeiture is moot. The trial court erred when it held the forfeiture of property provisions of the OMVI statutes unconstitutional on the record before it.

HN4 ¶ Unless **[*10]** a statutory scheme involves a suspect classification or a fundamental right, it survives an equal protection analysis when it bears a rational relationship to a legitimate governmental purpose. Menefee v. Queen City Metro (1990), 49 Ohio St. 3d 27, 550 N.E.2d 181. Unless the statute is wholly irrelevant to achievement of that purpose, it must be upheld. Conley v. Shearer (1992), 64 Ohio St. 3d 284, 595 N.E.2d 862.

HN5 ¶ Operation of a motor vehicle is a privilege, not a right. Doyle v. Bureau of Motor Vehicles (1990), 51 Ohio St. 3d 46, 554 N.E.2d 97. It is no doubt an important privilege, and cannot be denied without due process of law. However, it is not a fundamental right subject to the requirements of the Equal Protection clause.

HN6 ¶ The classifications created by the OMVI penalty statutes present no constitutionally suspect differences. Persons are classified according to their number of prior OMVI convictions. That the consequences of the penalties imposed on persons in those classes may involve more onerous burdens for persons who, coincidentally, have no alternative means of transportation readily available does not present a violation of the Equal Protection clause. **[*11]** Any violation arising from classifications created by legislation must be in the classifications themselves, not in their collateral consequences.

HN7 ¶ Whether a statute is rationally related to a legitimate governmental purpose depends on whether its goal is a legitimate one for government to seek and whether the means employed are rationally related to the goal involved. The rational basis test requires only that the statute's means be rationally related to its goal, not that the means employed must be the best way of achieving that goal. James v. Strange (1972), 407 U.S. 128, 92 S. Ct. 2027, 32 L.Ed. 2d 600.

Ohio has a legitimate governmental interest in curbing the danger presented by drunk drivers. A driver who is convicted for the third time in five years for an OMVI violation presents a significant risk to others who use the State's roads and highways. Suspension of the third-time offender's driving privileges for a longer period creates a proportional diminution of the risk to those persons that he or she presents. Impoundment of the offender's vehicle prevents use of that vehicle to commit further offenses during the impoundment period. While neither measure guarantees **[*12]** that the offender will not drive during those periods, neither is wholly irrelevant to achievement of the goal concerned. Therefore, they are rationally related to a legitimate governmental purpose.

The State's second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN FINDING THAT THE INSTANT ADMINISTRATIVE SUSPENSION OF A DRIVER'S LICENSE VIOLATED PROCEDURAL DUE PROCESS.

HN8 ¶ R.C. 4511.191 provides that if a person who has been arrested for OMVI refuses to submit to a chemical test of his or her blood, breath, or urine for its alcohol or drug content, and that if a person who submits to the test is shown to have a blood-alcohol level in a prohibited amount, the arresting officer *shall* serve a notice on the offender advising that his or her driving privileges are suspended immediately. **HN9** ¶ The statute further provides that the suspension will last until his or her initial appearance on the charge, which will be held within five days, and that the offender may appeal the

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suspension at the initial appearance. However, division (H)(1) provides that an appeal does not stay the operation of the suspension and "no court has jurisdiction to grant a [*13] stay of a suspension."

If the offender appeals the suspension, the hearing may be continued upon the motion of the offender, the prosecuting attorney, or the court. No limit is put on the continuance. The offender may obtain relief from the suspension if he shows, by a preponderance of the evidence, either that the arresting officer lacked probable cause to believe that a violation had occurred, or that the officer did not request the test or did not inform the arrestee of the consequences of taking it or not taking it, or that the officer did not request the test or that the offender did not fail to pass it.

With respect to these administrative suspension provisions, the trial court held: "To deny a person the right to operate a motor vehicle without any hearing is a violation of due process and as such is unconstitutional."

HN10 Driving privileges are constitutionally protected property interests and their deprivation or suspension by the government implicates the Due Process clause. Mackey v. Montrym (1979), 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321. Illinois v. Batchelder (1983), 463 U.S. 1112, 77 L. Ed. 2d 1267, 103 S. Ct. 3513. Whether procedural due process requires [*14] a hearing prior to the action being taken is a determination subject to a test balancing three factors:

"first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Mathews v. Eldridge 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976).

Mackey, supra 443 U.S.10.

With respect to the first prong of the *Mackey* test, the private interest affected by an administrative license suspension is substantial. The government cannot make a driver whole again for any losses she has suffered because of a delay in redressing an erroneous deprivation. The possible delay is not subject to any time limitation, other than the speedy trial requirements for the underlying charge, and the court is prohibited from staying the penalty imposed. The court is even prohibited for between fifteen days and six months [*15] from granting hardship relief in the form of occupational driving privileges. R.C. 4507.16.

With respect to the second prong, the risk of erroneous deprivation resulting from the summary procedures involved, the court stated in *Mackey*:

although this aspect of the *Eldridge* test further requires an assessment of a relative reliability of the procedures used and the substitute procedures sought, the Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible "property" or "liberty" interest be so comprehensive as to preclude any possibility of error. The Due Process Clause simply does not mandate that all governmental decision-making comply with standards that assure perfect error-free determinations. Thus, even though our legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error, the "ordinary principle" established by our prior decisions is that "something less than an evidentiary hearing is sufficient prior to adverse administrative action." And, when prompt post deprivation review is available for correction of administrative error, [*16] we have generally required no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be.

Mackey, supra, at 13. There is no *substantial* risk of erroneous deprivation where an arresting officer merely determines that the offender has refused to take the test and the results of such tests are so widely accepted as accurate that a failure to pass it does not present a significant potential for error.

With respect to the third prong of the *Mackey* test, the government's interests are served by the prompt removal of drunk drivers from the highways. Requiring a pre-suspension hearing would provide arrestees a stronger incentive to appeal and, in that event, would increase the state's administrative

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and fiscal burdens substantially.

HN11 ¶ Due process of law implies, in its most comprehensive sense, the right of the person affected thereby to be present before the tribunal which pronounces judgment upon a question of life, liberty or property, to be heard, by testimony or otherwise, and to have the right of controverting, [*17] by proof, every material fact which bears on the question of right in the matter involved.

Williams v. Dollison (1980), 62 Ohio St. 2d, 297.

HN12 ¶ The administrative suspension provisions of R.C. 4511.191 are not lacking in due process merely because they fail to provide for prior judicial review. *Mackey v. Montrym, supra, Maumee v. Gabriel* (1988), 35 Ohio St. 3d 60, 518 N.E.2d 558. Neither are they constitutionally infirm because they permit an indefinite continuance of post-deprivation reviews. It cannot be assumed that the courts will allow that to happen. Here, there is no failure to afford a prompt review, as Sanders requested no review.

HN13 ¶ R.C. 4511.191 is lacking in due process because, in view of the very real potential for continuances in busy municipal courts, coupled with the allied prohibition against occupational privilege exceptions in R.C. 4507.16, the absolute prohibition against stays of execution of the suspension pending a resolution of an appeal is an intolerable burden on the private interests of any driver who has been subject to an erroneous deprivation. It subjects him or her to an attenuated deprivation of a constitutionally protected property [*18] interest without a reasonable opportunity for relief. It also permits the state to seek and obtain a continuance, without limitation, that may impair a driver's capacity to bear the burden of proof imposed on him or her by the statute for reversal of the suspension. This denial of due process results from an unconstitutional exercise of the judicial power by the General Assembly, which has exercised the judicial power by prohibiting judicial stays of administrative suspensions in violation of the principle of separation of powers. (See Sixth Assignment of Error).

HN14 ¶ When unconstitutional features of a statute may be severed from its otherwise constitutional provisions, courts should sever those unconstitutional provisions to give effect to the remainder of the statute. *City of South Euclid v. Jemison* (1986), 28 Ohio St. 3d 157, 503 N.E.2d 136, R.C. 1.50. Here, this may be done by holding for naught *HN15* ¶ the provisions of R.C. 4511.191(H) which prohibit or preclude a court from staying execution of an administrative suspension during the pendency of an appeal to the court. We shall do so, and hold that the courts are not bound by those provisions of the statute.

The State's third assignment [*19] of error is sustained in part and overruled in part.

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN FINDING THAT THE IMPOUNDMENT OF A VEHICLE WITHOUT A PREDEPRIVATION HEARING VIOLATES PROCEDURAL DUE PROCESS.

HN16 ¶ R.C. 4511.195 requires that an arresting officer seize and impound the vehicle driven by a person arrested for an OMVI violation who has had at least one prior conviction in the past five years. The officer must also seize the license plates from the vehicle. The driver, or an innocent owner, can seek a return of the vehicle and its plates at the offender's initial appearance. The seizure provision does not apply to rental vehicles. The court is not prohibited from returning a driver's vehicle or its plates, but if the court does the driver must promise to make the vehicle available at the end of the case if temporary impoundment or forfeiture is then ordered by the court.

The trial court held that the impoundment procedures of R.C. 4511.195 amount to a violation of due process for lack of a prior hearing. However, *HN17* ¶ seizure without notice and an opportunity to be heard does not constitute a due process violation where the government has an important interest [*20] at stake, there is a need for prompt attention, the summary procedure is carried out by law enforcement officers under a narrowly drawn statute, and affected persons are afforded an opportunity to be heard after the seizure. *Astrol Calero-Toledo v. Pearson Yacht Leasing Co.* (1974), 416 U.S. 663, 40 L. Ed. 2d 452, 94 S. Ct. 2080.

The governmental interest involved, to keep drunk drivers off the road, is important, one that merits

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prompt action. The private interests affected by the seizure, the right to possession and use of private property, are more significant than the privilege to operate a motor vehicle involved in suspension of state-granted driving privileges. There is a more acute need, therefore, for a prompt remedy for any erroneous deprivation.

The summary seizure of the vehicle for impoundment is carried out by a law enforcement officer under a narrowly-drawn statute. The driver's record of prior arrests is readily verifiable. The arrest may be weighed according to objective criteria. The statute employs extensive notice procedures. Therefore, there is little opportunity for arbitrary action.

Finally, persons affected by the seizure are given a prompt opportunity [*21] to be heard. The driver or an innocent owner are given an opportunity to appeal the impoundment at the initial hearing, which must be held within five days after the impoundment. The request may also be made at any time thereafter. In contrast to provisions for administrative suspension of operator's privileges, R.C. 4511.195 contains no prohibition against stays of execution by the court, which has broad discretion to return the property seized.

On the foregoing analysis, we cannot find a violation of due process in the failure to hold a judicial hearing prior to the seizure of the vehicle and its license plates required by R.C. 4511.195. The fourth assignment of error is sustained.

FIFTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED FINDING THAT THE MANDATORY SENTENCING PROVISIONS VIOLATE THE EIGHTH AMENDMENT.

Sanders was subject to the sentencing provisions of ^{HN18} ~~*~~R.C. 4511.99(A)(3), which require the court to sentence a person who is convicted of a third OMVI offense within five years to a definite term of imprisonment of at least thirty consecutive days and no more than one year. In the alternative, the court may sentence the offender to fifteen days imprisonment and a term [*22] of electronically-monitored house arrest of from fifteen days to one year. The minimum term of imprisonment required under the statute may not be suspended, and during the term the offender is not eligible for work release.

R.C. 4511.99(A) makes like requirements for first, second, and fourth offenders, who must be sentenced to minimum terms of three, five and sixty consecutive days, respectively, with alternatives of electronically-monitored house arrest.

The trial court found the foregoing sentencing requirements unconstitutional, stating:

The sentencing provisions clearly violate the Eighth Amendment proportionality provisions. There are more than one hundred felonies that do not require any actual incarceration. A person convicted of Manslaughter, Gross Sexual Imposition, Arson, and numerous other felonies do not require any actual incarceration. Such mandated sentencing is irrational, capricious, and arbitrary as well as unconstitutional.

^{HN19} ~~*~~A penalty violates the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution, and Section, Article I, of the Ohio Constitution, if it is shocking to the community's sense of justice, barbaric, or [*23] grossly disproportionate to the criminal offense for which it is imposed. Solem v. Helm (1983), 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637, State v. Chaffin (1972), 30 Ohio St. 2d 13, 282 N.E.2d 46. The test for disproportionality looks to the gravity of the offense, the sentence imposed for other crimes in the same jurisdiction, and the sentence imposed for the same crime in other jurisdictions. *Id.*

With respect to the gravity of the offense involved, it is beyond question that persons who operate a motor vehicle while they are under the influence of alcohol subject others to a direct risk of death or serious bodily injury because the judgment and motor functions required for safe operation of a vehicle are impaired by the alcohol that the operator has consumed. It is well-documented that the injuries and death resulting from this practice are in the tens of thousands, nationally, every year. In terms of its possible consequences, operation of a motor vehicle on the public roads and highways while under the influence of alcohol is one of the most serious offenses one can commit.

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While it is true that Ohio does not require terms of actual incarceration for many [*24] felony offenses, the possible sentence for those offenses is far greater than the maximum sentences permitted by R.C. 4511.99(A). Similar mandatory sentence provisions are not applied to other misdemeanors, but those offenses generally do not present the risk of death or injury which an OMVI violation creates.

Seven other jurisdictions impose a mandatory jail sentence for a first OMVI offense. ¹ Three others require minimum mandatories for repeat offenders. ² Six others provide minimum mandatories for first offenders, with a community service alternative. ³

FOOTNOTES

¹ Alaska Stat. § 28.35.030 (1992); Ariz. Rev. Stat. Ann. § 28-692 (1994); Iowa Code § 321J.2 (1994); Idaho Code § 18-8004C (1994) (ten days for person convicted of driving with excessive alcohol levels); Mont. Code Ann. § 61-8-714 (1994); N.J. Rev. Stat. 39:4-50 (1994); Penn. Stat. Ann. 3731(e) (1994).

² Mass. Gen. Laws Ann. Ch. 90 § 24 (1995); Miss. Code Ann. § 63-11-30 (1994); N.H. Rev. Stat. Ann. § 265:82-B (1994).

³ Ark. Stat. Ann. § 5-65-111 (1993); Ky. Rev. Stat. § 189A-010 (1994); La. Rev. Stat. Ann. § 14.98 (1995); Nev. Rev. Stat. § 484.3792 (1994); N.M. Stat. Ann. 66-8-102(E) (1994); Or. Rev. Stat. 813.020 (1993).

[*25] We find that ^{HN20} the punishments required by R.C. 4511.99(A) are not so disproportionate to the offense involved to present a violation of the Eighth Amendment. The State's fifth assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN FINDING THAT THE MANDATORY SENTENCING PROVISIONS OF R.C. 4511.99 VIOLATE THE SEPARATION OF POWERS.

In its decision of September 7, 1994, the trial court stated:

The statutory amendments enacted by Amended Sub.S.B. 62 and 275 clearly violate the separation of powers. A legislature, eager for re-election has enacted laws that are clear and evident encroachments on the Court's powers. In these bills, the Legislative Branch of the Government is clearly telling the Judicial Branch, "If you don't do what we would like you to do we are going to order you to do it".

The trial court did not specify what part or parts of the statutes before it violate the principle of separation of powers. However, because ^{HN21} Sanders lacked standing to argue the unconstitutionality of those which did not apply to her case, we limit our consideration to those that did. On this record, in view of Sanders' guilty plea, the trial court's [*26] pronouncement are limited to the mandatory sentencing provisions in R.C. 4511.99(A) and the prohibition against judicial stays of administrative license suspensions in R.C. 4511.191(H).

While Ohio, unlike other jurisdictions, does not have a constitutional provision specifying the concept of separation of powers, this doctrine is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government. See State v. Harmon (1877), 31 Ohio St. 250. See, also, State ex rel. Bryant v. Akron Metro. Park Dist. (1929), 120 Ohio St. 464, 166 N.E. 407. While no exact rule can be set forth for determining what powers of government may or may not be assigned by law to each branch, Harmon, supra, 258, ". . . it is nevertheless true, in the American theory of government, that each of the three grand divisions of the government, must be protected from encroachments by others, so far that its integrity and independence may be preserved. * * * " Fairview v. Giffey (1905), 73 Ohio St. 183, 187, 76 N.E. 865.

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City of South Euclid v. Jemison (1986), 28 Ohio St. 3d [*27] 157, 158-159, 503 N.E.2d 136.

HN22 ¶ The Ohio Constitution organizes the government of the state into three co-ordinate branches and authorizes each to act in the ways provided. In contrast to the Executive and Judicial branches, to which powers are affirmatively granted by the Constitution, the General Assembly is not granted powers by the Constitution, which only provides limitations on the powers that the General Assembly may exercise. State v. Morris (1978), 55 Ohio St. 2d 101, 378 N.E.2d 708. Therefore, the General Assembly may pass any law unless it is specifically prohibited by the state or federal Constitutions or prohibited by a necessary and obvious implication they present. State ex rel. Jackman v. Court of Common Pleas of Cuyahoga County (1967), 9 Ohio St. 2d 159, 224 N.E.2d 906.

HN23 ¶ Section 1, Article IV, of the Ohio Constitution vests the judicial power of the state in its courts. Under the separation of powers doctrine, exercise of the judicial powers is confined to the courts. Ex parte Logan Branch Bank (1853), 1 Ohio St. 433. State ex rel. Chapman v. Chase (1856), 5 Ohio St. 528. State v. Harmon (1877), 31 Ohio St. 250. Hocking Valley R.Co. v. Cluster [*28] Coal & Feed Co. (1918), 97 Ohio St. 140, 119 N.E. 207. Therefore, the General Assembly may not exercise judicial powers. Cowen v. State (1920), 101 Ohio St. 387, 129 N.E. 719. State ex rel. Monnett v. Guilbert (1897, 56 Ohio St. 575, 47 N.E. 551. Bartlett v. State (1905), 73 Ohio St. 54, 75 N.E. 939. Fairview v. Giffie, supra. An act of the General Assembly that assumes to control or exercise judicial power is unconstitutional. State v. Guilbert, supra, Schario v. State (1922), 105 Ohio St. 535, 138 N.E. 63. Further, any such act constitutes a denial of due process of law. Creech v. P.A. & W.R. Co. (1893), 11 Ohio Dec.Rep. 764. (See Third Assignment of Error.)

HN24 ¶ Legislative bodies have the authority to set minimum penalties for criminal offenses. Chapman v. United States (1991), 500 U.S. 453, 111 S. Ct. 1919, 114 L. Ed. 2d 524.

It has long been recognized in this state that HN25 ¶ the General Assembly has the plenary power to prescribe crimes and fix penalties. Municipal Court v. State ex rel. Platter 126 Ohio St. 103, 184 N.E. 1 (1933). . . . Laws providing for definite sentences and law providing the courts with discretion in setting the penalty [*29] within well- defined limits have both been upheld as within the power of the General Assembly to enact.

State v. Norris, supra, at 98. This rule has been applied to minimum sentences for OMVI offenses. State ex rel. Owens v. McClure (1976), 48 Ohio St. 2d 1, 354 N.E.2d 921. Therefore, we find no violation of the principle of separation of powers presented by the mandatory sentencing requirements of R.C. 4511.191(H).

The inherent powers of a court are those essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction. The legislature does not inherently possess any judicial power. Any attempt by the legislature to exercise a judicial power or to limit or encroach upon the courts in the exercise of their inherent powers is an unconstitutional violation of the principle of separation of powers. 20 American Jurisprudence 2d., Courts, Section 78-79. 16 American Jurisprudence 2d., Constitutional Law, Section 326.

The powers to stay the proceedings before it is essential to the existence of a court and necessary to the orderly and efficient exercise of its jurisdiction. Therefore, HN26 ¶ the absolute prohibition of judicial stays [*30] of administrative license suspensions in R.C. 4511.191 violates the separation of powers principle. State v. Baker (1995), 70 Ohio Misc.2d 49, 68, 650 N.E.2d 1376. The reason for this view was well-stated in Smothers v. Lewis (Ky., 1984), 672 S.W.2d 62, at 64:

HN27 ¶ . . . [A] court, once having obtained jurisdiction of a cause of action, has, as an incidental to its constitutional grant of power, inherent power to do all things reasonably necessary to the administration of justice in the case before it. In the exercise of this power, a court, when necessary in order to protect or preserve the subject matter of the litigation, to protect its jurisdiction and to make its judgment effective, may grant or issue a temporary injunction in aid of or ancillary to principal action.

The control over this inherent judicial power, in this particular instance the injunction, is exclusively within the constitutional realm of the courts. As such, it is not within the purview of the legislature to grant or deny the power nor is it within the purview of the legislature to shape or fashion circumstances under which this inherently judicial power may be or may not be granted or denied .

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[*31] . .

The fact that the legislature statutorily provided for this appeal does not give it the right to encroach upon the constitutionally granted powers of the judiciary.

Also see Ardt v. Illinois Dept. of Professional Regulation (1992), 154 Ill.2d 138, 180 Ill. Dec. 713, 607 N.E.2d 1226. State v. Baker, supra.

As we noted above, the statute may be saved from its unconstitutional features by severing them from its other provisions. City of South Euclid v. Jemison, supra. Therefore we hold for naught the provisions of R.C. 4511.191 which prohibit the courts from staying administrative license suspensions pending their appeal. The remainder of the statute is not unconstitutional.

We cannot find that the other provisions of concern to the trial court violate the principle of separation of powers. Certainly, the General Assembly has in recent times taken a deep foray into the judicial process by adopting comprehensive and meticulous procedures which the courts must follow. It has done much the same in the area of domestic relations. See, R.C. 3113.21 et. seq. It has also done so in the area of victim's rights in criminal cases. See, R.C. Chp. 2930. Whether [*32] the problems of human behavior these measures were designed to govern will yield to their requirements has yet to be determined.

The State's sixth assignment of error is sustained in part and overruled in part.

SEVENTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN FINDING THAT THE IMPOUNDMENT OF A VEHICLE USED IN COMMITTING AN OMVI VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION AGAINST EXCESSIVE FINES.

The trial court held that the vehicle forfeiture provisions of R.C. 4511.99(A)(4) violate the Eighth Amendment's prohibition against excessive fines. However, Sanders was not subject to forfeiture because she was not a fourth-time offender. Therefore, the trial court erred when it ruled on an issue that Sanders lacked standing to present.

Sanders was subject to the provisions of R.C. 4511.99(A)(3)(b), requiring impoundment of her vehicle for 180 days. The State argues that the trial court erred when it held that impoundment violated the Excessive Fines clause of the Eighth Amendment because an impoundment is not a "fine" at all. We do not agree.

^{HN28} Impoundment imposes a temporary loss, rather than a permanent loss, and the government realizes no monetary benefit. However, [*33] the crucial question is whether the requirement imposes a monetary punishment. Austin v. United States (1993), 509 U.S. ____, 113 S. Ct. ____, 125 L.Ed. 2d 488. If it does, the Eighth Amendment applies, notwithstanding the fact that the requirement also has a remedial purpose. *Id.*

The purpose of the Eighth Amendment is to place limits on the steps government may take against an individual's rights and interests. Browning-Ferris v. Kelco Disposal (1989), 492 U.S. 257, 109 S. Ct. 2909, 106 L. Ed. 2d 219. Therefore, the focus of the Excessive Fines Clause is the impact of a monetary punishment on the individual, not merely whether the government is enriched, as the State argues.

Impoundment does not extract a monetary sum from an OMVI offender, at least not directly. However, in this respect a "fine" is any pecuniary penalty, that is, one consisting of money or one which can be valued in money. Loss of the possession and use of a valuable asset such as an automobile for a period of six months is a penalty that can be valued in money, as can the costs of impoundment which an offender may be required to pay. Therefore, we find that ^{HN29} the impoundment required by R.C. 4511.99(A)(3)(b) [*34] to which Sanders was subject is a "fine" for purposes of the Eighth Amendment.

^{HN30} The Excessive Fines clause of the Eighth Amendment applies to federal actions. It has not been applied to fines imposed by the states. People v. Elliott (1916), 27234 Ill. 592, 112 N.E. 300. However, ^{HN31} an identical prohibition is contained in Section 9, Article I, of the Constitution of Ohio. Therefore,

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the prohibition applies to the impoundment provisions of R.C. 4511.99(A)(3)(b), albeit under the Ohio Constitution.

HN32 ¶ A fine is excessive for constitutional purposes if its value in relation to the offense committed is grossly disproportionate. We believe that is not the case here. A person who has committed an OMVI violation for the third time in five years demonstrates a wanton disregard for the safety of others, and a harsh penalty is warranted regardless of the absence of any actual injury. Loss of one's vehicle for six months is proportionate to the offense as a matter of punishment. Indeed, it may be the only potential punishment that deters offenders whose recidivist tendencies, founded on an inability to resist getting behind the wheel when they are drunk, lead them to commit additional violations.

[*35] The State's seventh assignment of error is sustained.

EIGHTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN FINDING THAT R.C. 4511.99(A) IS AN ILLEGAL *EX POST FACTO* LAW.

HN33 ¶ A law that provides for the infliction of punishment on a person for an act which, when it was committed, was innocent, or that aggravates a crime or makes it greater than when it was committed, or that changes the punishment or inflicts a greater punishment than was provided when a crime was committed, is an *ex post facto* law. Article I, Section 10, of the United States Constitution forbids the passage of *ex post facto* laws by the states. The same is prohibited by Section 28, Article II, of the Constitution of Ohio.

The conduct which led to Sanders' conviction for a violation of R.C. 4511.19 took place on March 17, 1994. According to the version of R.C. 4511.99(A) then in effect, which became effective on September 1, 1993, Sanders was subject to greater penalties than first or second offenders convicted of the same violations because she had been convicted of violations of R.C. 4511.19 twice before within five years. Both were in 1990. Because these prior violations took place before the **[*36]** effective date of R.C. 4511.99(A), the trial court found that the penalty enhancement provisions of that statute violate the Constitutional prohibitions against *ex post facto* laws.

HN34 ¶ Statutes which enhance the penalty for repeat offenders based in part upon criminal conduct occurring prior to passage of the enhancement provision do not constitute *ex post facto* legislation. The enhancement provisions do not punish the past conduct; rather, the enhancement provisions merely increase the severity of a penalty imposed for criminal behavior that occurs after passage of the enhancement legislation. U.S. v. Ykema (1989), 887 F.2d 697. In re Allen (1915), 91 Ohio St. 315, 110 N.E. 535.

HN35 ¶ R.C. 4511.99(A) does not impose a punishment on Sanders for her past convictions. It merely increases the severity of the punishment imposed for her current offense because of those past conviction. It is not an *ex post facto* law.

The State's eighth assignment of error is sustained.

II.

Appeal of Defendant Kristen K. Sanders

Sanders presents a single assignment of error:

THE TRIAL COURT COMMITTED ERROR WHEN IT DENIED THE APPELLEE'S/CROSS APPELLANT'S MOTION TO DISMISS SINCE **[*37]** R.C. 411.191(A) UNCONSTITUTIONAL UNDER THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE STATE OF OHIO.

In support of this assignment Sanders argues that the punishment provisions of R.C. 4511.99(A), the administrative license suspension provisions of R.C. 4511.191, and the forfeiture and impoundment provisions of R.C. 4511.195, are all unconstitutional for various reasons. They are addressed below.

I. PUNISHMENT RENDERS STATUTE UNCONSTITUTIONAL

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A. Sanders argues that the mandatory incarceration provisions of R.C. 4511.99(A) violate the Eighth Amendment prohibition against punishments disproportionate to the crime involved. We reject this argument for the reasons stated in our discussion of the State's fifth assignment of error.

B. Sanders argues that the same mandatory incarceration provisions violate the Equal Protection clause because mandatory incarceration is not required for several felonies, including voluntary manslaughter, felonious assault, gross sexual imposition, burglary or robbery, which are far more serious than a R.C. 4511.19 misdemeanor.

^{HN36}*The Equal Protection clause does not prohibit disproportionate treatment of different classifications. [*38] Rather, it prohibits the creation of different classifications that are constitutionally suspect. Classifying individuals according to whether or not they have committed a particular offense, and then applying different penalties to those offenses, does not offend the Equal Protection Clause because the classifications involved are not constitutionally suspect.

C. Sanders argues that the forfeiture provisions of R.C. 4511.193(B)(2)(c) constitute an excessive fine in violation of the Eighth Amendment and Section 9, Article I, of the Ohio Constitution. R.C. 4511.193(B)(2)(c) is applicable only to persons convicted of their fourth OMVI violation in five years. Sanders was convicted of her third violation in five years. She is not subject to vehicle forfeiture, and she therefore lacks standing to make that objection. Valley Forge College v. Americans United (1982), 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700.

Sanders also argues that, while the fines required by R.C. 4511.99(A) may not be excessive, "the hidden costs of storage, re-testing, reinstatement, additional insurance bonds, etc., exceed the \$ 1000 (maximum fine) prescribed by the statutory scheme" for misdemeanors and, [*39] therefore, violate the Eighth Amendment's Excessive Fines clause. We agree that these "hidden costs" create a pecuniary loss to the offender that can be substantial. However, ^{HN37}*the concern of the Excessive Fines clause is limited to monetary punishments. Browning-Ferris v. Kelco Disposal, supra. Except for the costs of storage of an impounded vehicle, the other costs of which Sanders complains represent the costs of exercising the privilege to operate a motor vehicle after an OMVI conviction, not a punishment.

Impoundment is a form of "fine", so its costs must also be subject to an Excessive Fines clause analysis. We have found, in response to the State's seventh assignment of error, that impoundment of an offender's vehicle for six months is *not* an excessive fine. We did not consider the costs of vehicle storage because we do not know what they may be, or in this case could be. Therefore, on this record we cannot determine whether that particular "hidden cost" violates the Excessive Fines clause.

D. Sanders argues that the sentence enhancement provisions of R.C. 4511.99(A) for offenders with prior OMVI convictions violate the Constitutional prohibitions against *ex* [*40] *post facto* laws. We reject this argument for the reasons stated in our discussion of the State's eighth assignment of error.

E. Sanders argues that penalties for an OMVI violation are matters of local self-government and are, therefore, reserved to municipalities by the Home Rule Amendment to the Ohio Constitution, Section 7, Article XVIII. However, ^{HN38}*exercise of local power over those matters is limited by Section 6, Article XVIII to local laws and regulations not in conflict with the general laws of Ohio, which includes any law enacted by the state in exercise of its police powers. Canton v. Whitman (1975), 44 Ohio St. 2d 62, 337 N.E.2d 766. In any conflict, state law prevails. *Id.*

The OMVI statutes of which Sanders complains are exercises of the State's police power. Further, they are not in conflict with local laws that make the same prohibitions or presented the same penalties. Because there is no conflict, the Home Rule Amendment does not apply. If there was a conflict, the state law would prevail. No violation of the Home Rule Amendment is presented.

II. ADMINISTRATIVE LICENSE SUSPENSION

A. Sanders argues that the administrative license suspension provisions [*41] of R.C. 4511.191 are unconstitutional because they impact more adversely on persons who lack access to public transportation. We reject this argument for the reasons stated in our discussion of the State's second assignment of error.

B. Sanders argues that the administrative license suspension procedures of R.C. 4511.191 are lacking

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in due process of law because they permit the suspension without a prior hearing. We reject this argument for the reasons stated in our discussion of the State's third assignment of error.

C. ^{HN39} ~~F~~ R.C. 4511.191(C)(1) requires a person under arrest for OMVI to be advised of the consequences of refusal to submit to a chemical test and failure to "pass" the test to which he or she is asked to submit. The various consequences are those specified in divisions (E) and (F) of the statute. Sanders argues that a particular form adopted by the Director of the Bureau of Motor Vehicles for this purpose is deficient, not because it fails to conform to the statute's requirements but because it omits certain other consequences of the process. Sanders argues that "this information can best be applied in a courtroom setting", suggesting that such a proceeding is required for [*42] due process. Sanders cites and relies on several cases concerned with a failure to follow the requirements of R.C. 4511.191(C)(1). None present the constitutional issues Sanders argues. We find that her contentions that a judicial hearing is required by due process considerations lack merit.

D. Sanders argues that R.C. 4511.191(H) is unconstitutionally vague with respect to when the defendant must appeal an administrative license suspension. The statute provides that "the person may appeal the suspension at his initial appearance." Sanders contends that some courts regard the proceeding as civil in nature and apply the Ohio Rules of Civil Procedure to it while others regard it as criminal and employ the Ohio Rules of Criminal Procedure. That variation is unfortunate, but it does not result from any vagueness in the statute.

^{HN40} ~~F~~ OMVI violations are governed by the Ohio Traffic Rules. Traf.R. 8 provides for an arraignment on a traffic violation charge, which constitutes the "initial appearance" contemplated by R.C. 4511.191. The statute requires that event within five days of the arrest. We find no vagueness in these requirements as to *when* the appeal must be filed.

E. R.C. 4511.191(D)(3) [*43] provides that in any appeal of an administrative license suspension the written report of the officer who effected the suspension, which must contain the officer's observations and statements concerning the stop of the defendant, the subsequent arrest, and the results of the officer's request that the defendant submit it to a chemical test, which the officer is required by the statute to prepare, "shall be admitted and considered as prima facie proof of the information and statements that it contains." Sanders argues that as the report is inadmissible hearsay the provisions of R.C. 4511.191(D)(3) permitting its admission are void pursuant to Section 5(B), Article IV, Ohio Constitution, because they are in conflict with a rule of practice or procedure adopted by the Supreme court. We do not agree.

^{HN41} ~~F~~ The officer's report is *admissible* under Evid.R. 803(8) as an exception to the rule against hearsay as a record, report, or compilation setting forth matters observed pursuant to a duty imposed by law as to which matters there was a duty to report. State v. Ward (1984), 15 Ohio St. 3d 355, 474 N.E.2d 300. Sanders v. Hairston (1988), 51 Ohio App. 3d 63, 554 N.E.2d 951. The exception [*44] in Evid.R. 803(8) to criminal proceedings does not prevent its application because appeals of administrative suspensions are civil in nature, not criminal. Therefore, R.C. 4511.191(D)(3) is not in conflict with a rule of practice or procedure adopted by the Supreme Court.

F. Sanders argues that the provisions of R.C. 4511.191(H)(1) prohibiting stays of appeals of administrative license suspensions violates the principle of separation of powers and is unconstitutional. We agree, for reasons stated in our discussion of the State's Sixth Assignment of Error.

G. Sanders argues that the R.C. 4511.191(H)(1) prohibition of stays is void pursuant to Section 5(B), Article IV, of the Ohio Constitution because it is in conflict with App.R. 8, a rule of practice or procedure which permits the courts of appeal to stay the proceedings before them. Sanders lacks standing to argue this issue because she has not sought a stay of execution from this court.

H. Sanders argues that the administrative license suspension provision of R.C. 4511.191 violates the Double Jeopardy clause of the Fifth Amendment. However, Sanders did not raise this issue before the trial court, so she may not assign as error [*45] the trial court's failure to rule in her favor on it. State v. Thurman (June 28, 1995), Montgomery App. No. 14741, unreported.

III. FORFEITURE/IMPOUNDMENT

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A. Sanders argues that the impoundment provisions of R.C. 4511.195 fail to satisfy the requirements of due process of law. We reject this argument for the reasons stated in our discussion of the State's fourth assignment of error.

B. Sanders argues that she was denied the equal protection of the law when her vehicle was impounded because vehicles owned by persons other than the driver and vehicles rented or leased by a driver for thirty days or less are not subject to impoundment or may be released for causes inapplicable to Sanders. R.C. 4511.195(B)(1). R.C. 4503.235(B).

The Equal Protection clause prohibits classification of persons on a constitutionally suspect basis or on a basis which creates a denial of fundamental rights. Classifications of persons, or, rather, their property, according to whether they own, rent, or borrow the property they have employed in a violation of law does not create a system of classification that is constitutionally suspect. Neither does it deny a fundamental right. Persons in each [*46] classification may obtain return of the property concerned upon a showing provided by the statute, which addresses whether the owner knew or should have known that the driver would use the vehicle to commit a violation. Withholding its return, i.e., continuing the impoundment, on that basis satisfies the "rational basis" test required by Menefee v. Queen City Metro, supra, because it lessens the risk to the public which further operation of the vehicle by a repeat OMVI offender would present, and it is not wholly irrelevant to that purpose in the means employed to achieve it. *Id.*, Conley v. Shearer, supra.

III.

Conclusion

All of the State's assignments of error in 95 CA 11 are sustained except the Sixth Assignment of Error, which is overruled with respect to the provision in R.C. 4511.191(H) prohibiting judicial stays of administrative license suspensions, which we have found unconstitutional.

Defendant Sanders single assignment of error in 95 CA 12 is overruled, in part, except with respect to the argument that the provision in R.C. 4511.191(H) prohibiting judicial stays of administrative license suspensions is unconstitutional, which is sustained.

The sentence [*47] imposed by the trial court on Defendant Sanders is reversed and the case is remanded to the trial court for re-sentencing consistent with our decision herein.

WOLFF, J. and FAIN, J., concur.

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GIBSON-MYERS & ASSOCIATES, INC., Appellant v. MATTHEW A. PEARCE, Appellee

C.A. NO. 19358

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, SUMMIT COUNTY

1999 Ohio App. LEXIS 5010

October 27, 1999, Decided

PRIOR HISTORY: [*1] APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO. CASE NO. CV 97 09 5123.**DISPOSITION:** Judgment reversed and cause remanded.**CASE SUMMARY****PROCEDURAL POSTURE:** Appellant sought review from an order of the Summit County Court of Common Pleas (Ohio), compelling discovery of certain documents and business records.**OVERVIEW:** Appellee signed an employment agreement and a limited non-compete clause with appellant employer. Upon his termination, appellee allegedly began diverting many of appellant's clients in violation of the non-compete clause. Appellant brought suit for breach of the employment agreement. At a deposition, appellee requested documents from appellant for the first time. Two months later, appellee moved the trial court for an order compelling the production of the requested documents. The trial court granted the motion and appellant sought review. The court first determined that an order compelling the production of documents was a final order, and thus appealable. The court ruled appellee failed to comply with Ohio R. Civ. P. 34, which required that a formal written request was necessary for a motion to compel discovery. The trial court erred when it ordered the disclosure of the potentially confidential records without ever allowing appellant time to respond.**OUTCOME:** Judgment reversed and remanded; order compelling production was a final appealable order; appellee failed to comply with procedure rules, which required a formal written request for a motion to compel discovery; the court must have allowed time to respond to motion to compel.**CORE TERMS:** discovery, trade secrets, notice, deposition, assignments of error, production of documents, inspection, provisional remedy, disclosure, Ohio Rules, appealable, pertinent part, confidential, privileged, employment agreement, local rules, journal entry, specifically requested, ex parte, final orders, final judgment, written statements, contravention, partnership, consulting, pertaining, resisting, assigned, disclose, informal**LEXISNEXIS® HEADNOTES**[Hide](#)[Civil Procedure](#) > [Discovery](#) > [General Overview](#)[Civil Procedure](#) > [Appeals](#) > [Appellate Jurisdiction](#) > [Interlocutory Orders](#)

HN1 As a general rule, orders regarding discovery are interlocutory and not immediately

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HN2 Appellate courts have jurisdiction to review, affirm, modify, set aside or reverse judgments or final orders. [Ohio Rev. Code Ann. § 2501.02](#). An order of the trial court is final and appealable only if the requirements of [Ohio Rev. Code Ann. § 2505.02](#) are satisfied. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN3 See [Ohio Rev. Code Ann. § 2505.02\(B\)](#).

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HN4 A provisional remedy is defined as a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, or suppression of evidence. [Ohio Rev. Code Ann. § 2505.02\(A\)\(3\)](#). [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN5 It is axiomatic that documents containing privileged information or those constituting trade secrets are exempt from disclosure. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN6 Any order compelling the production of documents which constitute trade secrets is a final appealable order under [Ohio Rev. Code Ann. § 2505.02\(B\)\(4\)](#). [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN7 It is well established that a trial court enjoys considerable discretion in the regulation of discovery proceedings. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN8 Despite the discretion enjoyed by a trial court in discovery matters, it must consider both the interests of parties seeking discovery and the interests of parties resisting discovery. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Civil Procedure](#) > [Discovery](#) > [Methods](#) > [Requests for Production & Inspection](#)

HN9 The Ohio Rules of Civil Procedure clearly state that [Rule 34](#) requests are the only means by which discovery of documents from a party may be had. [Ohio R. Civ. P. 45\(A\)\(1\)\(c\)](#). [More Like This Headnote](#)

[Civil Procedure](#) > [Discovery](#) > [Methods](#) > [Requests for Production & Inspection](#)

HN10 [Ohio R. Civ. P. 34](#) states in pertinent part: any party may serve on any other party a request to produce and permit the party making the request, or someone acting on the requesting party's behalf (1) to inspect and copy, any designated documents that are in the possession, custody, or control of the party upon whom the request is served; (2) to inspect and copy, test, or sample any tangible things that are in the possession, custody, or control of the party upon whom the request is served; (3) to enter upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and photographing. [More Like This Headnote](#)

[Civil Procedure](#) > [Discovery](#) > [Methods](#) > [Requests for Production & Inspection](#)

HN11 [Ohio R. Civ. P. 37\(A\)\(2\)](#) states in part, if a party, in response to a request for inspection submitted under [Rule 34](#), falls to respond that inspection will be permitted as requested or

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fails to permit inspection as requested, the discovering party may move for an order compelling inspection in accordance with the request. [More Like This Headnote](#)

[Civil Procedure](#) > [Discovery](#) > [Methods](#) > [Requests for Production & Inspection](#)

HN12 * [Reading Ohio R. Civ. P. 34, 37 and 45](#) together, a motion to compel the production of documents, and more importantly an order to compel production of documents, may come only after a [Ohio R. Civ. P. 34](#) request. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Civil Procedure](#) > [Pleading & Practice](#) > [Motion Practice](#) > [General Overview](#)

HN13 * [Ohio R. Civ. P. 6\(D\)](#) states in pertinent part: a written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than seven days before the time fixed for the hearing, unless a different period is fixed by these rules or by order of the court. [More Like This Headnote](#)

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HN14 * [Loc.R. 7.14\(A\)](#) of the Court of Common Pleas of Summit County, General Division, states: every motion filed shall be accompanied by a brief stating the grounds upon which it is based, and a citation of authorities relied upon to support the motion. Within 10 days after receipt of a copy of a motion, opposing counsel shall prepare and file a response to the motion setting forth statements relied upon in opposition. Every motion so filed shall be deemed submitted and shall be determined upon the written statements of the reasons in support or opposition, as well as the citation of authorities. At any time after 14 days from the date of filing of the motion, the assigned judge may rule upon the motion. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Tax Law](#) > [State & Local Taxes](#) > [Administration & Proceedings](#) > [Tax Liens](#)

HN15 * If a trial court disregards the response time created by the Ohio Rules of Civil Procedure, that court has committed reversible error. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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JUDGES: BETH WHITMORE, JUDGE. SLABY, P.J. CARR, J. CONCUR.

OPINION BY: BETH WHITMORE

OPINION

DECISION AND JOURNAL ENTRY

Dated: October 27, 1999

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

WHITMORE, Judge.

Appellant, Gibson-Myers & Associates, Inc., has appealed from an order of the Summit County Court of Common Pleas compelling discovery of certain documents and business records. This Court reverses and remands for proceedings consistent with this decision.

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I.

Appellant is an insurance broker who at one time employed Matthew Pearce, Appellee. After working for five months, on January 31, 1992, Appellee signed an employment agreement with Appellant which contained, among other things, [*2] a limited non-compete clause. This clause prohibited Appellee from diverting or soliciting Appellant's clients or providing services to them for a period of three years after his employment with Appellant was terminated. The agreement did not prohibit him from continuing to work as an insurance agent upon termination or otherwise competing with Appellant.

During July, 1997, upon his termination from Appellant's office, Appellee allegedly began diverting and soliciting dozens of Appellant's clients with some success. As a result, on September 17, 1997, Appellant brought suit against Appellee for breach of the employment agreement. Appellee answered and filed a counterclaim alleging he was entitled to compensation under the employment agreement which he never received.

On June 9, 1998, pursuant to Civ.R.30(B)(5), Appellee filed a notice of deposition of Mr. Robert Myers. In this notice, Appellee requested Appellant to provide "copies of any and all commission statements, or equivalent records, received from any insurance company or carrier whose products were sold or offered for sale by [Appellee] for the years 1994 through 1997." Appellant was also requested to bring "any [*3] and all copies or agreements of any consulting company, or consulting agent, person or partnership or individual, or any person of any company, corporation, person or partnership for the years 1994 through 1997."

On August 6, 1998, at Mr. Myers' deposition, Appellee for the first time specifically requested the production of the following documents: (1) handwritten production records, (2) all ledger entries regarding each agent's continuing education compensation, (3) accounting records which indicate those accounts Appellee was responsible for recruiting, (4) accounting records pertaining to all clients' payment activity between 1992 and 1997, (5) Appellant's tax records from 1992 to 1997, (6) documents detailing the formula under which Appellee was to be compensated, and (7) Appellant's annual report detailing each agent's amount billed, receipts, etc.

Over two months later, on October 15, 1998, Appellee moved the trial court for an order compelling the production of the seven documents listed above. Four days later, without receiving any response from Appellant or making any other provision, the trial court granted the motion. This appeal followed.

II.

As a preliminary [*4] matter, this Court must first determine whether it has jurisdiction to hear this appeal. The order from which Appellant has appealed compels the discovery of several documents Appellant now wishes to protect. ^{HN1} ¶ As a general rule, orders regarding discovery are interlocutory and not immediately appealable. See Walters v. The Enrichment Ctr. of Wishing Well, Inc. (1997), 78 Ohio St. 3d 118, 676 N.E.2d 890; State ex. Rel Steckman v. Jackson (1994), 70 Ohio St. 3d 420, 639 N.E.2d 83; Polikoff v. Adam (1993), 67 Ohio St. 3d 100, 616 N.E.2d 213; Klein v. Bendix--Westinghouse Co. (1968), 13 Ohio St. 2d 85, 234 N.E.2d 587 (holding discovery orders of a trial court are not subject to immediate appellate review). Nevertheless, recent changes in the Ohio Revised Code have created several exceptions.

^{HN2} ¶ Appellate courts have jurisdiction to "review, affirm, modify, set aside or reverse judgments or final orders." R.C. 2501.02. An order of the trial court is final and appealable only if the requirements of R.C. 2505.02 are satisfied. Thus, a discussion of these threshold requirements [*5] is necessary.

^{HN3} ¶ R.C. 2505.02(B) provides in pertinent part:

An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a

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judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

R.C. 2505.02(B)(4). ^{HN4}*A "provisional remedy" is defined as "a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, or suppression of evidence." R.C. 2505.02(A)(3).

Appellant has argued that the trial court incorrectly granted Appellee's motion to compel the production of documents. Appellant has averred that [*6] the documents in question are confidential, and therefore, not subject to discovery.

^{HN5}*It is axiomatic that documents containing privileged information or those constituting trade secrets are exempt from disclosure. See State ex rel. The Plain Dealer v. Ohio Dept. of Ins. (1997), 80 Ohio St. 3d 513, 517, 687 N.E.2d 661; State ex rel. Toledo Blade Co. v. Univ. of Toledo Found. (1992), 65 Ohio St. 3d 258, 264, 602 N.E.2d 1159; Calihan v. Fullen (1992), 78 Ohio App. 3d 266, 604 N.E.2d 761. Just as the phrase "provisional remedy" encompasses the discovery of privileged material, it should also be read to include the discovery of confidential information, i.e. trade secrets. On its face, R.C.2505.02(A)(3) is flexible and able to address situations where a party has a protectable interest at stake and yet has no meaningful ability to appeal the decision which discloses that interest to others. If a trial court orders the discovery of trade secrets and such are disclosed, the party resisting discovery will have no adequate remedy on appeal. The proverbial bell cannot be unrung and an appeal after final judgment [*7] on the merits will not rectify the damage. In a competitive commercial market where customers are a business' most valuable asset and technology changes daily, disclosure of a trade secret will surely cause irreparable harm.

This Court holds that ^{HN6}*any order compelling the production of documents which constitute trade secrets is a final appealable order under R.C. 2505.02(B)(4). † In the case at bar, the record is void of any evidence pertaining to whether or not the documents in question constitute trade secrets. Therefore, this Court cannot determine whether the documents at issue are trade secrets. This is due in part to the trial court's premature ruling and its failure to hold a hearing on the record. Thus, upon remand, the trial court should request that both parties brief the issue, hold an *in camera* inspection of the documents, create a record of such and the court's findings, and finally, determine whether the documents requested constitute trade secrets under Ohio law. This Court now turns to the merits of this appeal.

FOOTNOTES

1 In 1997, this Court held that the right to nondisclosure of undiscoverable material is a substantial right and an order granting the disclosure of such was final and appealable. Natl. City Bank, N.E. v. Amedia (1997), 118 Ohio App. 3d 542, 545-46, 693 N.E.2d 837. In 1998, however, the General Assembly amended R.C. 2505.02, the statute being interpreted today. In light of the legislature's action, this Court reaches the same result only through a different analysis.

[*8] A.

^{HN7}*It is well established that a trial court enjoys considerable discretion in the regulation of discovery proceedings. Manofsky v. Goodyear Tire & Rubber Co. (1990), 69 Ohio App. 3d 663, 668, 591 N.E.2d 752, citing State ex rel. Daggett v. Gessaman (1973), 34 Ohio St. 2d 55, 295 N.E.2d 659, paragraph one of the syllabus. An abuse of discretion connotes an attitude on the part of the court that is unreasonable, unconscionable or arbitrary, not a mere error of judgment. Franklin Cty. Sheriff's Dept. State Emp. Relations Bd. (1992), 63 Ohio St. 3d 498, 506, 589 N.E.2d 24. Although a trial court possesses both statutory and inherent authority to regulate discovery, such authority is not unlimited. Indeed, ^{HN8}*despite the discretion enjoyed by a trial court in discovery matters, it must consider both the interests of parties seeking discovery and the interests of parties resisting discovery. Appellant has asserted four assignments of error. They have been rearranged to facilitate their disposition.

B.

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In its third assignment of error, Appellant has argued that the trial court erred by granting a motion to compel the production [*9] of documents in the absence of any request for production of documents under Civ.R. 34. This Court agrees.

^{HN9}¶The Ohio Rules of Civil Procedure clearly state that Rule 34 requests are the only means by which discovery of documents from a party may be had. Civ.R. 45(A)(1)(c) ("documents may be obtained from a party in discovery only pursuant to Civ.R. 34." (Emphasis added)). ^{HN10}¶Civ.R. 34 states in pertinent part:

Any party may serve on any other party a request to produce and permit the party making the request, or someone acting on the requesting party's behalf (1) to inspect and copy, any designated documents (including writings, ***) that are in the possession, custody, or control of the party upon whom the request is served; (2) to inspect and copy, test, or sample any tangible things that are in the possession, custody, or control of the party upon whom the request is served; (3) to enter upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and *** photographing, *** .

Civ.R. 34 goes on to state that the party upon whom the request is served must file a written response within [*10] the time specified in the request. Civ.R. 34(B). This provision indicates the method by which the non-requesting party may object to the request.

^{HN11}¶Civ.R. 37(A)(2) states in part, "if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling *** inspection in accordance with the request." Thus, ^{HN12}¶reading Civ.R. 34, 37 and 45 together, this Court concludes that a motion to compel the production of documents, and more importantly an order to compel production of documents, may come only after a Civ.R. 34 request.

In the case at bar, Appellee failed to submit a formal writing styled "Rule 34 Request for Production of Documents." It appears from the record, however, that Appellee did, in fact, request the documents at issue prior to his motion to compel. On August 6, 1998, during Mr. Myers' deposition, Appellee for the first time specifically requested each of the seven documents in issue. ² Nevertheless, this Court finds that Appellee has not fulfilled his obligation under the Ohio Rules of Civil Procedure. [*11] While recognizing and in no way discouraging this practice or any other variation of informal discovery, this Court holds that a formal, written Civ.R. 34 request is absolutely necessary before a motion to compel under Civ.R. 37(A) can be filed. Appellee's informal requests during Mr. Myers' deposition simply do not satisfy the mandate set forth in Civ.R. 45(A)(1)(c). Appellant's third assignment of error is, therefore, sustained.

FOOTNOTES

² Appellee's Civ.R. 30(B)(5) notice of deposition and the broad request for documents made therein is not in issue. While Civ.R. 30(B)(4) allows a Civ.R. 34 request to accompany a notice of deposition, no such request was clearly set forth in Appellee's notice. Moreover, the documents in issue were not specifically identified until Mr. Myers' deposition almost two months after Appellee's notice of deposition.

C.

In its second assignment of error, Appellant has argued that the trial court erred and abused its discretion by ordering the production of its records in contravention [*12] to Civ.R. 6(D) and Loc.R. 7.14(A) of the Court of Common Pleas of Summit County. ^{HN13}¶Civ.R. 6(D) states in pertinent part:

A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof shall be served not later than seven days before the time fixed for the hearing, unless a different period is fixed by these rules or by order of the court.

Likewise, ^{HN14}¶Loc.R. 7.14(A) of the Court of Common Pleas of Summit County, General Division,

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states:

Every motion filed shall be accompanied by a brief stating the grounds upon which it is based, and a citation of authorities relied upon to support the motion. Within ten (10) days after receipt of a copy of a motion, opposing counsel shall prepare and file a response to the motion setting forth statements relied upon in opposition. Every motion so filed shall be deemed submitted and shall be determined upon the written statements of the reasons in support or opposition, as well as the citation of authorities. At any time after fourteen (14) days from the date of filing of the motion, the assigned judge may rule upon the motion.

In this vein, the Ohio Supreme Court has stated, "However hurried a court [*13] may be in its efforts to reach the merits of a controversy, the integrity of procedural rules is dependent upon consistent enforcement because the only fair and reasonable alternative thereto is complete abandonment." *Miller v. Lint* (1980), 62 Ohio St. 2d 209, 215, 404 N.E.2d 752. Thus, ^{HN15} if a trial court disregards the response time created by the Ohio Rules of Civil Procedure, that court has committed reversible error. *In re Foreclosure of Liens for Delinquent Taxes* (1992), 79 Ohio App. 3d 766, 771-72, 607 N.E.2d 1160.

In this case, the trial court ordered disclosure of the potentially confidential records without ever allowing Appellant time to respond. While Appellant bears the ultimate burden of demonstrating that the records it seeks to protect are trade secrets, ³ the trial court must afford it the opportunity to do so. Appellee filed his motion to compel and only four days later, before Appellant had a chance to respond, and in contravention to both the Ohio Rules of Civil Procedure and the Summit County Local Rules, the trial court issued its order. ⁴ It never gave notice to Appellant of its intention to rule quickly. Instead, the trial [*14] court simply ordered the information disclosed *ex parte*. This is unacceptable.

FOOTNOTES

³ A party refusing to release records has the burden of showing that the records are exempt from disclosure. *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.* (1992), 65 Ohio St. 3d 258, 264, 602 N.E.2d 1159, citing *State ex rel. Natl. Broadcasting Co. v. Cleveland* (1988), 38 Ohio St. 3d 79, 526 N.E.2d 786, paragraph two of the syllabus.

⁴ It appears from the face of the order, the trial court signed it on October 15, 1998, the same day the motion to compel was filed. However, the court did not file its order until four days later, on October 19, 1998.

Appellee has argued that Appellant continued to delay and on the eve of trial, refused to disclose this information. This Court notes that if time is truly of the essence, the moving party may always request an accelerated response date, which with notice the trial court may grant. ⁵ In the end, a trial court must follow the Ohio [*15] Rules of Civil Procedure and its local rules. The non-moving party must be given time to present its arguments, regardless of their merit. Neither has occurred in the instant action. As such, Appellant's second assignment of error is sustained.

FOOTNOTES

⁵ This Court notes that Civ.R. 7(B)(2) gives a trial court an avenue around such procedural restraints and grants the authority rule on motions without an oral hearing in certain circumstances. Civ.R. 7(B)(2) provides:

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements or reasons in support and opposition.

However, the record fails to indicate any such provision or order by the trial court in the instant action.

D.

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This Court does not reach Appellant's first and fourth assignments of error in light of this Court's determination that, on remand, (1) Civ.R. 34 requests and responses may be filed, and (2) that a hearing must be held to [*16] evaluate whether the information at issue is discoverable or not, Appellant's arguments regarding due process and the relevancy, materiality, over-breadth, ambiguity, and scope of the trial court's order compelling discovery are moot. Therefore, pursuant to App.R. 12(A)(1)(c), this Court declines to address these issues.

III.

Appellant's second and third assignments of error are sustained. The order of the trial court is reversed and this action is remanded for proceedings consistent with this opinion.

Judgment reversed and cause remanded.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to Appellee.

Exceptions.

BETH WHITMORE

FOR THE [*17] COURT

SLABY, P.J.

CARR, J.

CONCUR

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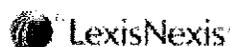
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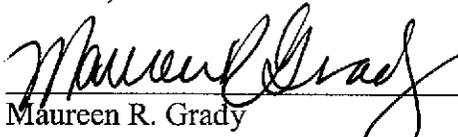
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Stay of Execution of the Office of the Ohio Consumers' Counsel was served upon all parties of record by hand-delivery or regular U.S. Mail this 8th day of October, 2009.



Maureen R. Grady
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